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PROCEEDINGS AND ORDERS

DATE: [07/02/96

CASE NBR: [95101691] CSY
SHORT TITLE: [Pennsylvania ]
VERSUS [LaBron, Edwin ]

STATUS: [DECIDED

DATE DOCKETED: [041996]

PAGE: [01

| ~~~~~~~~DATE~~~~ | NOTE~~~~~~~~~~~~~~~~~~~~PROCEEDINGS & ORDERS~~~~~~~~~~~~~~~~~~~~ |
|---|---|
| Apr 11 1996 | Petition for writ of certiorari filed. (Response due May 19, 1996) |
| Apr 11 1996 | Appendix of petitioner filed. |
| May 20 1996 | Brief of respondent Edwin LaBron in opposition filed. |
| May 20 1996 | Motion of respondent for leave to proceed in forma pauperis filed. |
| May 29 1996 | DISTRIBUTED. June 14, 1996 |
| Jun 9 1996 | Reply brief of petitioner filed. |
| Jun 17 1996 | REDISTRIBUTED. June 21, 1996 |
| Jun 21 1996 | REDISTRIBUTED. June 28, 1996 |
| Jul 1 1996 | Motion of respondent for leave to proceed in forma pauperis GRANTED. |
| Jul 1 1996 | Petition GRANTED. Judgment REVERSED and case REMANDED Dissenting opinion by Justice Stevens with whom Justice Ginsburg joins. Opinion per curiam. |

1 pp

95-1691

NO. _____

Supreme Court, U.S.
FILED
11 1996
CLERK

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1995**

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COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

EDWIN LABRON

---

On Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

---

# PETITION FOR WRIT OF CERTIORARI AND APPENDIX - VOLUME I

---

RONALD EISENBERG
Deputy District Attorney
(Counsel of Record)
JOAN WEINER
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
ARNOLD GORDON
First Assistant District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

## QUESTION PRESENTED

Has the Pennsylvania Supreme Court properly understood this Court's precedent in declaring that police who have probable cause must still secure a warrant to search a car parked on a street, unless they can show particular exigent circumstances beyond the inherent mobility of the vehicle?

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**The Pennsylvania Supreme Court has effectively abrogated the "automobile exception" by declaring -- in reliance on this Court's Fourth Amendment jurisprudence -- that police acting with probable cause cannot search a car parked on a street unless they can show particular exigent circumstances beyond the inherent mobility of the vehicle.**

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## OPINIONS BELOW

The January 12, 1996 judgment and opinion of the Supreme Court of Pennsylvania, reversing the judgment of the intermediate appellate court, the Superior Court of Pennsylvania, is reported at 669 A.2d 917 (Pa. 1995), and is reprinted in the Appendix at App. 1-34.[1] The January 6, 1993 judgment and memorandum opinion of the Superior Court of Pennsylvania is unreported but is reprinted in the Appendix at App. 35-43. The July 31, 1992 opinion of the Court of Common Pleas of Philadelphia County is unreported, but is reprinted in the Appendix at App. 44-53.

## STATEMENT OF JURISDICTION

This is a state criminal prosecution where respondent filed a motion in the trial court, the Philadelphia Court of Common Pleas, seeking to suppress cocaine on the ground, inter alia, that it was seized from an automobile in violation of the Fourth and Fourteenth Amendments of the United States Constitution. On March 5, 1992, the trial court suppressed the evidence, finding that the seizure was supported by probable cause but was nonetheless unlawful because of the absence of a warrant.

Upon appeal by petitioner, the Commonwealth of Pennsylvania, the intermediate state appellate court, the Superior Court of Pennsylvania, reversed the suppression order in a judgment and memorandum opinion dated January 6, 1993. Respondent filed a petition for allowance of appeal in the Supreme Court of Pennsylvania. On May

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[1] The Court's opinion shows a filing date of December 29, 1995, but judgment was not entered, and the opinion was not issued, until January 12, 1996.

26, 1994, the Supreme Court granted the petition for allowance of appeal. After briefing and oral argument, the supreme court reversed the decision of the superior court, holding that, under the "automobile exception" derived from this Court's Fourth Amendment case law, a police officer who develops probable cause to believe that contraband is in an automobile must nevertheless demonstrate that it was impracticable to obtain a search warrant before conducting a warrantless search.

The jurisdiction of this Court to review the final judgment of the Supreme Court of Pennsylvania, based upon its construction of the federal Fourth Amendment, is invoked under 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the United States Constitution, which provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Due Process Clause of Section 1 of the Fourteenth Amendment of the United States Constitution, which provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.



## STATEMENT OF THE CASE

This case is one of a series of recent decisions in which the Pennsylvania Supreme Court has held, on the basis of Fourth Amendment precedent, that a car cannot be searched without either a warrant or a case-by-case showing that exigent circumstances -- beyond the inherent mobility of the vehicle -- prevented the securing of a warrant.

The case began in August, 1990. A police officer investigating drug dealing on a particular street in Philadelphia got a tip that drug dealers were stashing cocaine in certain cars parked on the block. One of the vehicles was described as a 1977 blue Lincoln. To corroborate the tip, the officer conducted surveillance from a confidential location. App. 60, 132-33. During the two-hour surveillance, he saw respondent and another male sell drugs to numerous customers.

Whenever respondent and his accomplice ran out of drugs to sell, a confederate appeared and resupplied them from a stash of cocaine in the trunk of a 1977 blue Lincoln. App. 63-66. At one point in the surveillance, the resupplier handed the other seller a set of keys and drove away. Minutes later, two couriers arrived to deliver a shipment of cocaine to the operation. Using the newly arrived keys, respondent placed two large bags of cocaine inside the trunk of the blue Lincoln. App. 66-72.

The investigating officer called for assistance and arrested respondent, the other seller, and the couriers. The police then searched the trunk of the blue Lincoln and removed the two large plastic bags of cocaine that had just been delivered. App. 71-72. Respondent was held for trial on charges of possession of a controlled substance with the

intent to deliver, 35 Pa. C.S. § 780-113(a)(16), (a)(30), and criminal conspiracy, 18 Pa. C.S. § 903.

Respondent moved to suppress the drugs, citing the United States and Pennsylvania Constitutions, without distinguishing between the two. App. 57-58. At the suppression hearing, on November 20, 1991, respondent presented no evidence, and the investigating officer's testimony remained uncontradicted.

The suppression court credited the officer's testimony, App. 262, but granted respondent's suppression motion, concluding that, under the Fourth Amendment, even though the police had probable cause to believe that there was cocaine in the Lincoln, they could not search without a warrant because there was no specific exigency that prevented them from securing one.[2]

Petitioner appealed to the intermediate state appellate court, the Superior Court of Pennsylvania. On January 6, 1993, the Superior Court reversed the suppression order and issued an opinion explaining that under the Fourth Amendment and the Pennsylvania Constitution, which was co-extensive on the question, probable cause permitted the warrantless search under the "automobile exception."

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[2] The suppression court based its conclusion solely on Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991), App. 258, an "automobile exception" case decided exclusively under the Fourth Amendment. When the court wrote its post-verdict opinion four months later, it made additional reference to Commonwealth v. Baker, 518 Pa. 145, 541 A.2d 1381 (1988), an "automobile exception" case decided under b4oth the federal and state constitutions, which were viewed as coterminous on the question.



Respondent petitioned for discretionary review. The state Supreme Court granted review in this case and two other unrelated cases involving the "automobile exception." The state supreme court then held in each of the three cases that the Fourth Amendment's "automobile exception" (which the court continued to view as coterminous with the Pennsylvania Constitution on the question) required not only probable cause for the search, but also proof that the police did not have time or opportunity to get a warrant.[3]

Thus, in the case at bar, the court concluded that because the investigating officer had information about the Lincoln's role in the drug operation, he supposedly could have secured a warrant before he went to the scene, and was therefore required to obtain one before setting up surveillance. The court further held that, once the officer actually saw the Lincoln being used to store cocaine, he was precluded under the "automobile exception" from conducting a warrantless search absent a showing of an articulable exigency that made it impracticable to obtain a warrant.

Because of the court's insistence that the "automobile exception" precluded a warrantless search

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[3] The opinion in the present case was dated December 29, 1995. However, judgment was not entered, and the opinion was not issued, until January 12, 1996. The other cases in the trilogy are Commonwealth v. Kilgore, 1995 WL 790060 (Pa., opinion dated December 26, 1995, judgment entered January 24, 1996), and Commonwealth v. White, 669 A.2d 896 (Pa., opinion dated December 29, 1995, judgment entered January 4, 1996).

absent an additional showing of exigent circumstances, petitioner filed this petition for writ of certiorari.

## REASONS FOR GRANTING THE WRIT

**The Pennsylvania Supreme Court has effectively abrogated the "automobile exception" by declaring -- in reliance on this Court's Fourth Amendment jurisprudence -- that police acting with probable cause cannot search a car parked on a street unless they can show particular exigent circumstances beyond the inherent mobility of the vehicle.**

The decision below -- one of a trilogy of recent "automobile exception" cases wrongly decided by the Pennsylvania Supreme Court -- purports to apply the "automobile exception" to the Fourth Amendment but turns seventy years of constitutional automobile-search jurisprudence on its head.

Over those many years, this Court has repeatedly held that because automobiles are inherently mobile and because citizens enjoy a substantially diminished expectation of privacy in their automobiles, warrantless car searches are permitted upon a demonstration of probable cause without more.

The Pennsylvania Supreme Court has completely eviscerated that principle. Purporting to interpret the Fourth Amendment, it held in this case and the two others that probable cause alone is insufficient as a matter of law to justify a warrantless car search.



The police here had information from sources that drug dealers were using a blue Lincoln parked at a particular location as a stash for retail cocaine traffic. Recognizing that the mere existence of a tip often will not establish probable cause, the police chose to corroborate their information through surveillance at the scene. When the police saw respondent conduct numerous street sales, and saw him refill the drug supply in the car, they arrested him and seized the drugs, rather than leaving the car for several more hours to secure a warrant. The officers' conduct was in complete accord with this Court's Fourth Amendment interpretations.

Yet the Pennsylvania Supreme Court believed that, because the police had uncorroborated information about the car before they conducted surveillance, they were legally obligated to get a search warrant. The evidence, said the court, was not "admissible without first requiring the Commonwealth to demonstrate that exigent circumstances prevented them from obtaining a warrant." App. 20.

That interpretation of the Fourth Amendment is flatly wrong. This Court has left no room for argument on the question: a warrantless car search is proper under the Fourth Amendment if it is made with probable cause. There is no need to demonstrate, case-by-case, a specific inability to obtain a warrant.

Thus, in California v. Carney, 471 U.S. 386 (1985), when a government agent developed information about a motor home being used for illicit purposes, conducted surveillance, corroborated his information, and entered the vehicle without a warrant, this Court held that the warrantless entry was perfectly proper under the

"automobile exception" because the agent had probable cause.

There is nothing distinguishing Carney from the instant case. The police there, as here, had advance information that a vehicle was being used in criminal activity, they went to the scene to corroborate the information, and they conducted a warrantless search of the vehicle based on a showing of probable cause alone. Because the "automobile exception" required no more, the warrantless search was upheld. The result should have been the same here but was not simply because the Pennsylvania Supreme Court is obviously under the erroneous impression that an additional showing of an articulable exigency is required.

This Court's holding in United States v. Ross, 456 U.S. 798, 807 (1982), further demonstrates the Pennsylvania Supreme Court's misunderstanding. In Ross, the police received a tip from an informant and went to the targeted location, where they found Ross selling drugs from the trunk of a car. They arrested Ross and immediately searched his car and its trunk. After finding drugs in a container in the trunk, the police transported the car to a police station and searched it again. This time they found a quantity of cash in another container.

Relying on the "automobile exception," this Court upheld the warrantless search of both the car and the containers at both locations because they were supported by probable cause. If the warrantless search in Ross was valid under the "automobile exception" upon a showing of probable cause alone, so was the search here.

The holdings in Carney and Ross are not extraordinary; they are but two examples of this Court's



long-standing view -- going back to Carroll v. United States, 267 U.S. 132 (1925) -- that, because citizens have a diminished expectation of privacy in their automobiles, and because automobiles are inherently mobile, the Fourth Amendment permits police officers to conduct warrantless car searches as long as they have probable cause. See United States v. Johns, 469 U.S. 478, 484 (1985) ("A vehicle lawfully in police custody may be searched on the basis of probable cause to believe that it contains contraband, and there is no requirement of exigent circumstances to justify such a warrantless search"); Michigan v. Thomas, 458 U.S. 259 (1982) (right to conduct warrantless search of automobile with probable cause does not "depend upon a reviewing court's assessment in each particular case that the car would have been driven away, or that its contents would have been tampered with, during the period required for the police to obtain a warrant"); Texas v. White, 423 U.S. 67 (1975) (warrantless car search at police station upon probable cause held proper); Cardwell v. Lewis, 417 U.S. 583 (1974) (under "automobile exception," probable cause allowed for warrantless search without proof of articulable exigency); Chambers v. Maroney, 399 U.S. 42 (1970) (warrantless search of impounded vehicle upheld under "automobile exception" based on showing of probable cause).[4]

It does not matter if the warrantless search occurs, as here, on the roadway after the suspects have already been arrested, or later at an impoundment lot. Nor does it matter

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[4] The "automobile exception" includes within its bounds the warrantless search of automobile trunks, Arkansas v. Sanders, 442 U.S. 753 (1979); Cady v. Dombrowski, 413 U.S. 433 (1973), glove compartments, South Dakota v. Opperman, 428 U.S. 364 (1976), and any other part of the car where contraband may be hidden.

if, as here, the automobile is already immobile before the police arrived. Colorado v. Bannister, 449 U.S. 1 (1980) (automobile exception applies even where the police never see vehicle in actual motion). In all these cases, the existence of probable cause to search the automobile, without showing specific exigencies, satisfies the Fourth Amendment.[5]

Clearly, the Pennsylvania Supreme Court has interpreted the "automobile exception" in a manner wholly inconsistent with this Court's development of the exception. Indeed, the Pennsylvania court's interpretation of the

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[5] The federal courts of appeal, unlike the Pennsylvania Supreme Court, have had little trouble applying this clear case law, and have regularly rejected attempts to graft onto the "automobile exception" the extra requirement erroneously pronounced here. See United States v. Jones, 31 F.3d 1304 (4th Cir. 1994) (warrantless search of automobile justified with probable cause even though officers had advance information about truck before conducting search); United States v. Hatley, 15 F.3d 856 (9th Cir. 1994) (as long as warrantless car search based on probable cause, no further exigency need be shown); United States v. Markham, 844 F.2d 366, 368 (6th Cir. 1988) (police do not have to show inability to obtain warrant; Fourth Amendment allows search on showing of probable cause alone); United States v. Cruz, 834 F.2d 47 (2d Cir. 1987) (where agents develop probable cause, arrest owner of truck and search truck two hours later without a warrant, search permitted under "automobile exception"); United States v. Swingler, 758 F.2d 477 (10th Cir. 1985) (view that "automobile exception" applies only when there are exigent circumstances "has never been endorsed by the [United States] Supreme Court and is, in fact, inconsistent with that Court's development of the exception").



exception abolishes it by requiring the same kind of proof for warrantless car searches as for warrantless house searches. In its place, the court in effect imposes the far more intrusive requirement that the police immobilize the suspect vehicle (and themselves) for several hours pending the arrival of a warrant.

Had the "automobile exception" been properly applied, this retrogressive result could not have been reached. The police did not act precipitously here; they secured probable cause precisely by resisting the temptation to jump the gun. That probable cause was alone sufficient to justify the warrantless car search. The law simply did not require the officers to wait further to confirm the obvious risk that the drug dealers would move the car or sell or secrete the drugs before a warrant could be obtained.

Indeed, given the clarity of the controlling principle, it is difficult to see how the state court achieved its contrary ruling. The court started off its legal discussion well enough, quoting accurately from this Court's decisions in Carroll and Chambers. App. 9-11.

At that point, however, the court referred to Pennsylvania cases decided two and three decades ago -- in explicit reliance on this Court's case law -- for the proposition that "'there is no "automobile exception" as such,'" and that "'the movability of [an automobile] is not alone a sufficiently "exigent circumstance" to justify a warrantless search.'" App. 11-12.[6]

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[6] Commonwealth v. Holzer, 480 Pa. 93, 103, 389 A.2d 101, 106 (1978) (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971) and Chambers); Commonwealth v. Cockfield, 431 Pa. 639, 644, 246 A.2d 381, 384 (1968) (citing Chapman v. United States, 365 U.S. 610 (1961)).

Armed with this incomplete understanding of current Fourth Amendment law, the supreme court continued through a discussion of several more Pennsylvania decisions, each and every one of which purported to apply federal precedent. App. 12-19.[7] Yet the opinion below never even cited a decision of this Court more recent than Chambers, and made no attempt to square its notion of federal constitutional requirements with this

[7] Commonwealth v. Milyak, 508 Pa. 2, 7-9, 493 A.2d 1346, 1349 (1985) (interpreting Chambers, South Dakota v. Opperman, United States v. Chadwick, 433 U.S. 1 (1977), Colorado v. Bannister, and United States v. Ross); Commonwealth v. Timko, 491 Pa. 32, 38, 417 A.2d 620, 623 (1980) (interpreting Chambers); Commonwealth v. Lewis, 442 Pa. 98, 102, 275 A.2d 51, 53 (1971) (interpreting Chambers); Commonwealth v. Baker, 518 Pa. 145, 148-49, 541 A.2d 1381, 1383 (1988) (interpreting Ross and Commonwealth v. Milyak, Commonwealth v. Holzer, and Commonwealth v. Lewis, each of which in turn interpreted Chambers); Commonwealth v. Rodriguez, 526 Pa. 268, 272-74, 585 A.2d 988, 990-91 (1991) (interpreting Commonwealth v. Milyak and Commonwealth v. Baker, each of which relied on Chambers); Commonwealth v. Ionata, 518 Pa. 472, 476-77, 544 A.2d 917, 919-20 (1988) (interpreting Ross and Commonwealth v. Milyak, Commonwealth v. Lewis, Commonwealth v. Holzer, and Commonwealth v. Cockfield, all of which relied on this Court's decisions); Commonwealth v. White, 669 A.2d 896, 899-901 (1995) (interpreting Chambers and Commonwealth v. Ionata, Commonwealth v. Milyak, and Commonwealth v. Cockfield, all of which relied on this Court's decisions).



Court's actual body of law on the automobile exception.[8]

[8] There is no issue in this case of an adequate and independent state ground that would support the lower court's holding.

Although respondent mentioned both the federal and state constitutions before the suppression court, he did not argue then that the state provision entitled criminals to any broader protection regarding the automobile exception. App. 57-58.

Nor did the suppression court make any such distinction in its ruling, relying on state court decisions (Commonwealth v. Rodriguez and Commonwealth v. Baker) that were explicitly based on federal law. App. 49-52.

The intermediate state appellate court did the same. App. 39-43.

And, as discussed above, so did the state supreme court. The opinion referred at one point to both the state and federal constitutions, App. 8-9, and to "this Commonwealth's jurisprudence of the automobile exception," App. 20. But every authority discussed on those topics was in fact a decision of this Court or a decision interpreting a decision of this Court.

Indeed, the Pennsylvania Supreme Court itself has, in a subsequent case, treated the opinion in this case as one based on the Fourth Amendment. Commonwealth v. Kilgore, 1995 WL 790060 at *3 (Pa., dated December 26, 1995, judgment entered January 24, 1996) (quoting decision in this case, and stating that "we are constrained to conclude that the search of Appellant's vehicle was

As mentioned above, the Pennsylvania Supreme Court's misreading of the "automobile exception" is not an anomaly limited to this one case. Indeed, within three days of the decision here, the court similarly decided two other "automobile exception" cases. In both Commonwealth v. Kilgore, 1995 WL 790060 (Pa., December 26, 1995), and Commonwealth v. White, 669 A.2d 896 (Pa. 1995), the court held, as it did here, that even though the police clearly had probable cause to search the vehicle in question, their warrantless searches were improper under the Fourth Amendment because the Commonwealth did not demonstrate specific exigent circumstances, beyond inherent mobility, that would justify the failure of the police to obtain a warrant before searching the vehicle. That burden of proof simply is not part of the Fourth Amendment's "automobile exception" equation.

Because the Pennsylvania Supreme Court has so fundamentally misinterpreted the "automobile exception" and grafted onto it an evidentiary requirement that has been soundly rejected by this Court, its incorrect decision below should be reviewed and reversed.

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conducted in a manner which violated his rights under the Fourth Amendment").

Thus, the resolution of the suppression claim in this case was hardly the "plain statement" of an independent state ground required to defeat this Court's jurisdiction. New York v. Class, 475 U.S. 106 (1986). Accord, Illinois v. Rodriguez, 497 U.S. 177 (1990).



## CONCLUSION

For these reasons, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(Counsel of Record)
JOAN WEINER
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
ARNOLD GORDON
First Assistant District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
1421 Arch Street
Philadelphia, Pa. 19102
(215) 686-5700
DATE: April 11, 1996

# APPENDIX

**IN THE SUPREME COURT OF PENNSYLVANIA**
**EASTERN DISTRICT**

| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA, Appellee** | : | **No. 43 Eastern District Appeal Docket 1994** |
| | : | **Appeal from the Judgment of Superior Court entered January 6, 1993 at No. 1276 PHL 1992, reversing the Order entered on March 5, 1992 in the Court of Common Pleas, Criminal Division, Philadelphia County at No. 9009-2318-19** |
| **v.** | : | |
| **EDWIN LABRON, Appellant** | : | **ARGUED: JANUARY 25, 1995** |

**OPINION**

**DECIDED: December 29, 1995**

**MR. JUSTICE MONTEMURO**

Appellant, Edwin Labron, appeals from a memorandum opinion and per curiam order of the Superior Court reversing an order of the Court of Common Pleas of Philadelphia County suppressing evidence seized during a warrantless search of an automobile.

We granted permission for this appeal in order to determine whether the Commonwealth must establish the existence of exigent circumstances in order to justify the warrantless search of an automobile, or if the "automobile exception" to the warrant requirement requires only that the Commonwealth establish the existence of probable cause. Because we believe that the automobile exception requires a showing of both probable cause and exigent circumstances, we hold that the Superior Court incorrectly applied the automobile exception to this case.

On August 24, 1990, Officer Gerald Nimmo of the Philadelphia Police Department, assigned to the narcotics unit, established surveillance of the 900 block of Auburn Street in the City of Philadelphia from a confidential location. During his surveillance, he observed Appellant and another male, Santiago, conduct transactions in which Appellant and Santiago would accept cash from individuals on the street in exchange for small plastic bags filled with white powder. Based upon his experience as a police officer, he believed that the packets were filled with cocaine and that the exchanges constituted the sale of illegal drugs. A short while later, Officer Nimmo observed a third male, Melendez, approach Appellant and Santiago. The three men proceeded to a blue Lincoln automobile which was parked on the south side of Auburn Street.

With a key, Melendez opened the trunk of the car, reached inside, and retrieved a bag. From the bag, Melendez produced two other bags, giving one each to Appellant and Santiago. The bags contained smaller packets filled with white powder. In exchange for the bags, Appellant and Santiago gave Melendez currency. Melendez closed the trunk while Appellant and Santiago returned to the street to continue what Officer Nimmo believed to be drug transactions.



A short time later, the three men again met and again approached the blue Lincoln, where Melendez repeated the exchange of bags containing smaller packets filled with white powder for cash from Appellant and Santiago. A few minutes afterward, Melendez approached Santiago and handed him a set of keys. Thereafter, Melendez got into another car, a blue Ford stationwagon, and drove away. Appellant and Santiago continued to transact sales.

Approximately ten minutes after Melendez had left, a blue Toyota pulled into the 900 block of Auburn Street. Two men exited the vehicle and approached Santiago. Appellant approached the group and Santiago gave him a set of keys. Appellant went to the blue Lincoln and used the keys to open its trunk. One of the men from the Toyota retrieved a plastic bag from the passenger side of the Toyota and gave it to Appellant, who was waiting at the blue Lincoln. Appellant took the bag and placed it in the trunk, which he then closed, returning the keys to Santiago.

The two men from the Toyota got into their automobile and drove away. Back-up officers who were waiting a few blocks away stopped the blue Toyota and arrested its two occupants. Other back-up officers quickly arrived on Auburn Street and arrested Appellant and Santiago. At that point, Officer Nimmo directed another officer to open the trunk of the blue Lincoln. Upon doing so, the officers found two plastic bags and a plastic sandwich bag, all filled with what proved to be cocaine.

Appellant, charged with delivery of a controlled substance[1] and criminal conspiracy,[2] filed a motion seeking to suppress the evidence obtained from the warrantless search of the automobile. After a hearing, the trial court granted Appellant's motion, holding that although Officer Nimmo had probable cause, the Commonwealth had failed to establish the existence of exigent circumstances in order to justify the warrantless search.

The Commonwealth appealed the suppression order to the Superior Court which, concluding that the trial court had incorrectly analyzed the automobile exception to the warrant requirement, reversed the suppression order. The Superior Court determined that the law does not require the existence of both probable cause and separate exigent circumstances as prerequisites to a valid warrantless search of an automobile. Rather, the court found that

> [t]he automobile exception to the warrant requirement demands only that an officer have probable cause to believe that evidence of a crime or contraband will be found within the vehicle....

Commonwealth v. Labron, No. 01276 Philadelphia 1992, slip op. at 7-8 (Pa.Super., January 6, 1993) (footnote omitted). The court further held that the inherent mobility of an automobile, without more, is sufficient to justify a warrantless search once probable

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[1] 35 P.S. § 780-113(30).

[2] 18 Pa.C.S. § 903.



cause to search the vehicle has been established. Id. at 9.

In this appeal, Appellant argues that the Superior Court erred in concluding that once probable cause exists to conduct a search, the automobile exception is a per se exception to the warrant requirement. Appellant additionally argues that the trial court correctly determined that because the police had adequate information and time within which to secure a warrant, no exigent circumstances existed to justify the warrantless search of the vehicle.

As a preliminary matter, even though recognizing that the Commonwealth concedes that Appellant has standing to contest the search in question, the dissent contends that Appellant does not have "such standing as to have a right to be before this or any Court to seek suppression of the evidence in issue." Dissent at 1. The dissent further notes that even if Appellant does have standing, he nevertheless does not have a reasonable expectation of privacy sufficient to warrant suppression of the evidence. It is clear, however, that issues not raised in the lower courts, or raised at the trial level but not preserved on appeal, will not be considered by an appellate court. Commonwealth v. McKenna, 476 Pa. 428, 383 A.2d 174 (1978); Pa.R.A.P. 302(a).

Addressing a similar argument that a petitioner lacked an expectation of privacy sufficient to prevail on a fourth amendment claim, the United States Supreme Court, noting that the argument had not been raised in the courts below, concluded that the government had lost its right to challenge petitioner's legitimate expectation of privacy. Steagald v. United States, 451 U.S. 204, 211 (1981). See also Commonwealth v. Govens, 429 Pa. Super. 464, 632 A.2d 1316 (1993), alloc. denied,

539 Pa. 675, 652 A.2d 1321 (1994) (wherein the Superior Court, en banc, recognized that when standing to contest police conduct is not raised at the suppression hearing, a belated attempt to raise the issue on appeal must be rejected.)

In this case, during the pre-trial motions, the Commonwealth argued that even though the two men from the Toyota had standing, they did not have a sufficient expectation of privacy to contest the search. At that point, the Commonwealth noted that although its argument was directed at the suppression motions filed by the men in the Toyota, it also included Appellant. Specifically, the Commonwealth stated that

> whether [Appellant] has a reasonable expectation of privacy based on [the fact that he used a key to open the trunk], we would dispute that.

(N.T. III at 5).

Nevertheless, after the grant of suppression on Appellant's motion and after having been ordered to file a full and complete statement of the matters complained of on appeal pursuant to Pa.R.A.P. 1925(b), the Commonwealth submitted the following issue:

> Did the lower court err in granting defendant's motion to suppress based on a determination that police officers cannot search a vehicle without first obtaining a search warrant, even though probable cause exists to believe the vehicle contains contraband?



Consequently, the Commonwealth abandoned its claim that Appellant lacked a reasonable expectation of privacy sufficient to challenge the police conduct.

> Where a defendant is ordered to file a concise statement of matters complained of on appeal, pursuant to Pa.R.A.P. 1925(b), and fails to raise a particular matter within that statement, the defendant is deemed to have waived that point of error on appeal. Commonwealth v. Warren, 332 Pa. Super. 410, 481 A.2d 681 (1984); Pa.R.A.P. 1925(b).

Commonwealth v. Phillips, 411 Pa. Super. 329, 342, 601 A.2d 816, 822 (1992), aff'd, 534 Pa. 423, 633 A.2d 604 (1993). Moreover, as the Commonwealth specifically failed to raise this issue, it was not addressed by either the Court of Common Pleas or the Superior Court and thus, effective appellate review is precluded. See Commonwealth v. Montgomery, 513 Pa. 138, 518 A.2d 1197 (1986), cert. denied, 480 U.S. 935 (1987) (this Court refused to address an exclusionary rule issue which the Commonwealth failed to adequately preserve). Therefore, the standing and expectation of privacy issues were waived, and as such, they do not merit review.

It is well established that when a motion to suppress has been filed, the Commonwealth bears the burden to establish by a preponderance of the evidence that the evidence is admissible.[3] Commonwealth v.

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[3] The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence

(continued...)

Johnsonna, 420 Pa. Super. 434, 438, 616 A.2d 1376, 1378 (1992), alloc. denied, 625 A.2d 1191. Furthermore, while reviewing the ruling of a suppression court, our role is limited to determining whether the factual findings are supported by the record, Commonwealth v. DeWitt, 530 Pa. 299, 301, 608 A.2d 1030, 1031 (1992), and whether the legal conclusions drawn from those facts are correct. Commonwealth v. Morris, 537 Pa. 417, 420, 644 A.2d 721, 723 (1994) (citing Commonwealth v. Cortez, 507 Pa. 529, 532, 491 A.2d 111, 112, cert. denied, 474 U.S. 950 (1985)).

This Court has consistently recognized the well established principle that the Fourth Amendment to the United States Constitution[4] and Article 1, § 8 of the

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[3](...continued)

> was not obtained in violation of the defendant's rights. The defendant may testify at such hearing, and, if he does so, does not thereby waive his right to remain silent during the trial.

Pa.R.Crim.P. 323(h).

[4] The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. CONST. amend. IV.



Pennsylvania Constitution[5] generally require that searches be predicated upon a warrant issued by a neutral and detached magistrate. Searches conducted outside the judicial process, that is, without a warrant, are generally deemed unreasonable for constitutional purposes. Commonwealth v. Holzer, 480 Pa. 93, 102, 389 A.2d 101, 106 (1978) (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)). However, a well established exception to the warrant requirement exists for certain automobile searches. Commonwealth v. Milyak, 508 Pa. 2, 7-8, 493 A.2d 1346, 1349 (1985).

The automobile exception was first enunciated by the United States Supreme Court in Carroll v. United States, 267 U.S. 132 (1925). Chief Justice Taft, writing for the majority, traced the history of the Fourth Amendment and the legislative enactments of the First, Second and Fourth Congresses. In so doing, the Supreme Court concluded that

> a difference [was] made as to the necessity for a search warrant between goods subject to forfeiture, when concealed in a dwelling house or similar place, and like

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[5] The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

PA. CONST. art. 1, § 8.

> goods in course of transportation and concealed in a movable vessel where they readily could be put out of reach of a search warrant.

Carroll, 267 U.S. at 151. More specifically, the Court held that

> since the beginning of the government, [the guaranty of freedom from unreasonable searches and seizures has been construed] as recognizing a necessary difference between a search of a store, dwelling house, or other structure in respect of which a proper official warrant readily may be obtained and a search of a ship, motor boat, wagon, or automobile for contraband goods, where it is not practicable to secure a warrant, because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153.

Having concluded that impracticality in securing a warrant could permit a warrantless search for contraband carried in a vehicle, the Supreme Court addressed the circumstances under which such a search would be constitutionally permissible. The Court opined that

> [t]he measure of legality of such a seizure is therefore, that the seizing officer shall have reasonable or probable cause for believing that the automobile which he



> stops and seizes has contraband ... therein....

Id. at 155-56.

Subsequent to Carroll, the United States Supreme Court also determined that given probable cause to search an automobile,

> [f]or constitutional purposes, [there is] no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.

Chambers v. Maroney, 399 U.S. 42, 52 (1970).

When reviewing warrantless automobile searches in this Commonwealth, we have constantly held that "there is no 'automobile exception' as such and [that] the constitutional protections are applicable to searches and seizures of a person's car." Commonwealth v. Holzer, 480 Pa. 93, 103, 389 A.2d 101, 106 (1978) (citing Coolidge v. New Hampshire, 403 U.S. 443 (1971)). Recognizing that principle, we have nevertheless described two reasons why exigent circumstances often excuse the need to secure a warrant:

> First, a vehicle is highly mobile and the likelihood is therefore great that it and its contents may never be found if police were prohibited from immobilizing it until a warrant can be secured;

and

> [s]econd, one's expectation of privacy with respect to an automobile is significantly less than that relating to one's home or office.

Id. (citations omitted).[6]

In Commonwealth v. Milyak, 508 Pa. 2, 493 A.2d 1346 (1985), the defendant sought to suppress evidence which police had obtained by searching his vehicle without a warrant. In that case, we reiterated that

> there is an established departure from the warrant requirement for certain automobile searches based on the inherent mobility of vehicles, with the consequent practical problems in obtaining a warrant prior to infringing a legitimate expectation of privacy, and on the "diminished expectation of privacy which is accorded automobiles because of their open construction, their function, and their subjection to a myriad of state regulations."

Commonwealth v. Milyak, 508 Pa. 2, 7-8, 493 A.2d 1346, 1349 (1985) (citing Commonwealth v. Timko, 491

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[6]In 1968, this Court recognized that "sometimes [it] may be reasonable to search a movable vehicle without a warrant," however, we nevertheless held that "the movability of the area to be searched is not alone a sufficiently 'exigent circumstance' to justify a warrantless search." Commonwealth v. Cockfield, 431 Pa. 639, 644, 246 A.2d 381, 384 (1968).



Pa. 32, 38, 417 A.2d 620, 623 (1980)). Furthermore, in order for a warrantless search to fit within the exception,

> an officer must have independent probable cause to believe that a felony has been committed by the occupants of the vehicle, or that it has been used in the furtherance of the commission of a felony, or the officer must have a basis for believing that evidence of a crime is concealed within the vehicle, or that there are weapons therein which are accessible to the occupants.

Id. at 8, 493 A.2d at 1349 (citing Commonwealth v. Lewis, 442 Pa. 98, 101, 275 A.2d 51, 52 (1971)). Consequently, based upon state and federal constitutional standards, we concluded that "where there exists probable cause related to the vehicle or its occupants, a search of the vehicle is permissible." Id.

In 1988, we had the opportunity to review another automobile exception case. In Commonwealth v. Baker, 518 Pa. 145, 541 A.2d 1381 (1988), the police had received a tip from a reliable informant that defendant was carrying a gun in his automobile. A few minutes after having received the tip, the police discovered defendant's vehicle in a parking lot. A search of defendant's vehicle revealed a six-inch revolver under the driver's seat. We agreed with the Superior Court that the gun was admissible evidence because the need for a warrant was excused by the presence of probable cause and exigent circumstances. Id. at 148, 541 A.2d at 1383. We discussed the constitutional analysis as follows:

> It is well established that automobiles are not per se unprotected by the warrant requirements of the Fourth Amendment, and of Art. 1, § 8 of the Pennsylvania constitution. Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101 (1978). Nevertheless, certain exigencies may render the obtaining of a warrant not reasonably practicable under the circumstances of a given case, and when that occurs, vehicle searches conducted without warrants have been deemed proper where probable cause was present. See Commonwealth v. Milyak, 508 Pa. 2, 493 A.2d 1346 (1985); Commonwealth v. Holzer, [480 Pa. 93, 389 A.2d 101 (1978)]; Commonwealth v. Lewis, 442 Pa. 98, 275 A.2d 51 (1971)....

Id.

In Baker, we recognized that the search of defendant's vehicle took place just thirty minutes after the information from the reliable informant had been received by the police. Because of the tipster's reliability and because the police were able to corroborate independently the type of vehicle in which defendant was riding, probable cause existed to conduct the search, and, as a result, "the exigencies of the mobility of the vehicle and of there having been inadequate time and opportunity to obtain a warrant rendered the search proper." Id. at 149, 541 A.2d at 1383. However, we specifically noted that

> [t]his is not a case where police knew hours in advance that a particular vehicle carrying evidence of crime would be parked in a particular locale, such that it



> would have been reasonably practicable to obtain a search warrant before encountering the vehicle to be searched.

Id.

In 1991, we again addressed the constitutionality of a warrantless automobile search, having been asked to determine whether there was sufficient probable cause to search the automobile, and if so, were the circumstances such that a warrant was not required. Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991). In that case, police had received information from two reliable informants regarding defendants' drug dealing activities. The police received tips on November 15, 1985, November 23, 1985 and November 27, 1985. Each time, the police were informed that the defendants were coming to York to sell cocaine, and, at least on one occasion, the police had been informed where the deliveries were taking place. The type of vehicle which the defendants used had been established on November 15, 1985. On November 27, 1985, the police spotted the defendants' car pulling away from the residence which the informant had described as the delivery location. The police stopped the defendants and conducted a search of the car.

We affirmed the trial court's denial of the defendants' motion to suppress, beginning our discussion by analyzing whether, under the "totality of the circumstances" test, the police had sufficient probable cause to search the vehicle. We concluded that they did. Thereafter, we addressed the defendants' argument that no exigencies existed especially because the police had adequate time within which to secure a warrant. We held that because the police encountered defendants' vehicle as it was moving away from the alleged delivery locale,

there was no opportunity for the police to secure a warrant. We concluded that

> where police do not have advance knowledge that 'a particular vehicle carrying evidence of crime would be parked in a particular locale, ... the exigencies of the mobility of the vehicle and of there having been inadequate time and opportunity to obtain a warrant rendered the search [without a warrant] proper.'

Commonwealth v. Rodriguez, 526 Pa. 268, 274, 585 A.2d 988, 991 (1991) (citing Commonwealth v. Baker, 518 Pa. 145, 149, 541 A.2d 1381, 1383 (1988)). Accordingly, we held that both probable cause and exigent circumstances existed to justify the warrantless search of the automobile.

Recently, we again had the occasion to address the admissibility of evidence seized during a warrantless search of an automobile in Commonwealth v. White, ___ Pa. ___, ___ A.2d ___ (1995). In that case, the Pittsburgh Police Department had received numerous telephone calls from anonymous sources. Those sources informed the police that William White and Henry Bennett were dealing drugs, and furthermore, they described the location where the drug sales were taking place. After corroborating that information with information received from a confidential informant, the police arranged a controlled drug purchase in January of 1990, which was observed by two officers.

One month later, the police received information from the informant that he had observed a large supply of cocaine at Bennett's residence, that drugs were being transported back and forth between Bennett's and



White's homes and that a sale was scheduled for Saturday, February 17, 1990, behind Abbot's Beer Distributor. Based on this information, the police arranged for surveillance of the area. Prior to setting up surveillance, the two officers who had observed the January drug transaction briefed other members of the police department, informing them that a blue car was expected to be involved in a drug transaction.

Furthermore, before actually conducting the surveillance, police sought and obtained search warrants for Bennett's residence, Bennett's vehicle, Bennett's person, White's residence and White's person, but not White's automobile. While conducting the surveillance, police observed White drive his automobile into the location of the alleged sale. At that point, an unidentified individual got into the car. The police surrounded White's vehicle and took its two occupants into police custody. A warrantless search of White's automobile was conducted and cocaine was discovered.

The Superior Court reversed the trial court's suppression order, concluding that the warrantless search had been properly conducted pursuant to the automobile exception. The Superior Court reasoned that because the officers did not know which vehicle would be used to facilitate the transaction, the use of White's automobile was an unforeseeable circumstance which provided the necessary exigency.

We disagreed. Based upon an earlier per curiam affirmance in Commonwealth v. Ionata, 518 Pa. 472,

544 A.2d 917 (1988),[7] we held that when the police

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[7]Justice Flaherty wrote the opinion in support of affirmance in Ionata. Therein, he noted that the police had advance information that defendant would be transporting contraband in his vehicle. In that regard, Justice Flaherty determined that

> [b]y neglecting to obtain a warrant covering the vehicle, and by approaching appellee immediately upon his arrival, the officers inexplicably took the risk that appellee would at least temporarily have kept the drugs in the automobile, and, thus, they took the risk that appellee would not yet have moved any of the contraband into areas covered by the search warrant. In short, this case does not involve a search conducted under exigent circumstances; rather, it involves a search undertaken after the police had, through oversight or lack of planning, failed to obtain a warrant to search a vehicle that they knew hours in advance would be parked at appellee's apartment after it had been used to transport contraband. Indeed, it would be difficult to conceive of a case where the circumstances surrounding a challenged search would be more clearly non-exigent than those presented here. Thus, inasmuch as obtaining a warrant would certainly have been practicable, suppression of the items seized in the instant search was entirely proper.

(continued...)



have ample advance information that a search of an automobile is likely to occur in conjunction with apprehension of a suspect, "a warrant is required before the automobile may be searched." Commonwealth v. White, ___ Pa. at ___, ___ A.2d ___. Moreover, based upon our analysis of Chambers v. Maroney, 399 U.S. 42 (1970), we held that

> although the Fourth Amendment generally requires probable cause to be determined and a warrant to be issued by a magistrate before a search may be conducted, unforeseen circumstances involving the search of an automobile coupled with the presence of probable cause, may excuse the requirement for a search warrant. In Ionata and in this case, there were no unforeseen circumstances. Police knew in advance what automobiles might be involved and could have requested warrants for the search of the automobiles, just as they did for persons and dwellings.

Id. at ___, ___ A.2d at ___ (footnote omitted) (emphasis supplied).

We also disagreed with the Superior Court's conclusion that the officers' lack of knowledge with respect to which vehicle would be used constituted an unforeseen circumstance. Rather, we concluded that the lack

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[7](...continued)

Commonwealth v. Ionata, 518 Pa. 472, 479, 544 A.2d 917, 920-921 (1988).

of knowledge was not sufficient to qualify as an unforeseen circumstance because the "[p]olice could have drafted their request for a warrant in terms that were 'as particular as is reasonably possible' ... in order to secure the warrant." Id. at ___ n. 3, ___ A.2d at ___ n. 3 (citing Commonwealth v. Grossman, 521 Pa. 290, 296, 555 A.2d 896, 899 (1989)).

Therefore, we conclude that this Commonwealth's jurisprudence of the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search. Furthermore, we have consistently recognized that when police have advance information that a particular vehicle carrying evidence of a crime would be situated at a particular locale, such that sufficient time exists to obtain a warrant, the failure of the police to secure a warrant prior to searching the vehicle will render the search unreasonable. This holding is equally applicable when police have advance information that a particular vehicle carrying contraband to be used in the commission of a crime will be parked in a specific location.

Consequently, the Superior Court erroneously held that evidence seized during a warrantless automobile search was admissible without first requiring the Commonwealth to demonstrate that exigent circumstances prevented them from obtaining a warrant.

Therefore, we now turn to Appellant's argument that the Court of Common Pleas correctly determined that the warrantless search of this stationary vehicle violated constitutional guarantees because the police had substantial time, information and opportunity to obtain a warrant in advance of the search. As such, we must



determine whether the suppression court's factual findings are supported in the record.

A review of the record indicates that Officer Nimmo conducted surveillance of Auburn Street on August 24, 1990. At that time, he was already familiar with that particular street as he had made numerous narcotics arrests there within the previous six weeks. Furthermore, he had information from various sources regarding drug sales on Auburn Street and the use of a Lincoln automobile. At the suppression hearing, testimony with respect to Officer Nimmo's prior knowledge was as follows:

> Q. incidentally, what was your purpose in going to that surveillance point that day?
>
> A. The information I had that cocaine was being sold at that location. I had further information that the one male received large quantities of cocaine. My intention was to try to take off what was being delivered.
>
> * * *
>
> Q. Well, what information did you have about the delivery taking place?
>
> A. I had information that Raphael Melendez lived at 913 Auburn Street. He was the one that had the workers on the street and that he had received, he would receive his cocaine. It would be delivered on Auburn Street and he used several cars to store the stuff. One was a Lincoln.

There was another car on the north side of the street. I don't recall what that was now. It was an abandoned car. There was no tags on that.

Q. And when did you get that information?

A. I had gotten that information from numerous, from several places, from my own investigation, from other people that had been arrested, from people that called from the neighborhood.

Q. And how long had you had that information before you went to make your surveillance that day?

A. I had been doing surveillances on that street and I had made several arrests, other arrests.

The trial court also had the following exchange with Officer Nimmo:

> Q. Could you describe the physical condition of [the Lincoln] to me?
>
> A. The outside, the side and the rear that I saw looked fairly decent. It wasn't in new condition.
>
> Q. Did it have four tires on it?
>
> A. Four tires. It had the glass, It looked like it would be legal for the highway.



> Q. It had a tag?
>
> A. Yes, sir.
>
> Q. Is it your testimony that before you went out to Auburn Street you had specific information about this Lincoln automobile before you got there that day?
>
> A. That and another car, yes, sir.

Moreover, Officer Scarpato testified regarding the back-up assistance as follows:

> Q. on that particular detail, you were part of the surveillance detail?
>
> A. I was part of the backup unit.
>
> Q. The backup unit for the surveillance detail.
>
> A. That's correct.
>
> Q. How many brother officers were with you in that backup unit?
>
> A. In my vehicle, there was three other officers. And there were two more vehicles. I'm not sure how many officers were in that.
>
> Q. Had you met to discuss the game plan, if you will, prior to setting up the surveillance?

A. [After Judge Lord overruled an objection of counsel] We had talked about it up in headquarters prior to going out.

Q. And how many people were part of that group that talked at headquarters and ultimately went out to the field?

A. I would say eight or nine.

The suppression court concluded that because Officer Nimmo had information prior to establishing surveillance, the automobile exception was inapplicable. Specifically, the court determined that the exception based on exigencies was inapplicable because

> the police appear to have known well in advance of their search that a particular vehicle, the blue Lincoln, carrying evidence of a crime would be parked in a particular location, the 900 block of Auburn Street.

Commonwealth v. Labron, Nos. 2318-29, slip op. at 8 (C.P. Philadelphia County, July 31, 1992).

Based upon our review of the record, we believe that sufficient evidence exists in the record to support the suppression court's finding that Officer Nimmo had sufficient, perhaps even specific, information about the blue Lincoln automobile prior to setting up surveillance. He had information from numerous sources, including his own participation in other arrests, that drug sales were occurring on Auburn Street. He was investigating Melendez because he also had information that Melendez was in charge of the drug sales on that street. He additionally had information that Melendez used several



cars parked on the street in which to store the drugs and that a Lincoln was one of those cars. Furthermore, Officer Nimmo testified that prior to setting up the surveillance, he had specific information about that Lincoln.

Therefore, we reverse the order of the Superior Court.

Mr. Justice Castille files a Dissenting Opinion.

Mr. Justice Montemuro participates by designation as a senior judge as provided by Rule of Judicial Administration 701(f).

Judgment entered
Dated: January 12, 1996

/s/
Charles W. Johns, Esquire
Prothonotary

IN THE SUPREME COURT OF PENNSYLVANIA
EASTERN DISTRICT

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|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA, Appellee, | : | No. 43 Eastern District Appeal Docket 1994 |
| | : | Appeal from the Judgment of Superior Court entered January 6, 1993 at No. 1276 PHL 1992, reversing the Order entered on March 5, 1992 in the Court of Common Pleas, Criminal Division, Philadelphia County at No. 9009-2318-19 |
| v. | : | |
| EDWIN LABRON, Appellant . | : | ARGUED: January 25, 1995 |

**DISSENTING OPINION**

DECIDED:
December 29, 1995

**MR. JUSTICE CASTILLE**

Although the majority correctly characterizes Pennsylvania law regarding the "automobile exception" to the warrant requirement, I write separately only because I do not believe that this case should have been allowed to proceed to this point because, although the Commonwealth inexplicably has conceded standing in its brief, I do not believe appellant has such standing as to



have a right to be before this or any Court to seek suppression of the evidence in issue. I, therefore, dissent to the majority's consideration of the merits of appellant's suppression claim as I do not believe this Court should rule upon matters wherein the complaining party has no standing. I further disagree with the majority's reversal of the Superior Court because even if appellant has standing, he nevertheless does not have a reasonable expectation of privacy that would warrant suppression of the illegal drugs seized from a third party's car.

Although these issues upon which I would base our affirmance of the Superior Court's ruling were not raised by the Commonwealth either on appeal to the Superior Court or in the brief to this Court, it is well established that this Court may affirm the order of the court below if the result it reached is correct for any reason. Commonwealth v. Allsup, 481 Pa. 313, 317, 392 A.2d 1309, 1311 (1978) (Superior Court based ruling on Constitutional issue, but this Court raised the issue of statutory interpretation *sua sponte* and affirmed on those grounds); Commonwealth v. Triplett, 476 Pa. 83, 90 n.10, 381 A.2d 877, 881 n.10 (1977) (Court *sua sponte* raised waiver issue and based affirmed order on those grounds); Commonwealth v. Colon, 461 Pa. 585 n.5, 337 A.2d 554, 558 n.5 (1975), cert. denied, 423 U.S. 1056 (1976) (Court *sua sponte* found statement which was suppressed by trial court as hearsay to be inadmissible because not relevant); Commonwealth v. Hines, 461 Pa. 462, 464 n., 336 A.2d 280, 282 n.2 (1975) ("While the question of waiver has not been raised by any party to this litigation, this Court may affirm an order if it is correct for any reason."), citations omitted. Because appellant did not have standing and therefore did not have a right to bring the issue of the validity of the search before the courts, I believe this

issue should be raised sua sponte and I would affirm the order of the Superior Court on those grounds.

In order to challenge the admission of evidence at a criminal trial, a defendant must, as a fundamental prerequisite, show that he has standing to challenge the search or seizure by which the government obtained the evidence. See Rakas v. Illinois, 439 U.S. 128, 140 (1978) (courts applying federal law must first determine whether a particular search violated protected fourth amendment interests before examining the legality of the search). See also Commonwealth v. Peterson, 535 Pa. 492, 497, 636 A.2d 615, 617 (1993) (having first had his standing acknowledged, a criminal defendant is only then permitted to assert the merits of his suppression motion). The standing requirement in the criminal suppression context narrows the reach of the exclusionary rule by limiting the field of individuals permitted to challenge an illegal search or seizure. The standing requirement thereby helps conserve scarce judicial resources. See Wm. Penn Parking Garage, Inc. v. City of Pittsburgh, 464 Pa. 168, 191, 346 A.2d 269, 280 (1975).

The United States Supreme Court limits Fourth Amendment standing to those criminal defendants who can demonstrate a "legitimate expectation of privacy" in an item seized or the area searched. Rawlings v. Kentucky, 448 U.S. 98, 104 (1980) (defendants must show not just that the search was illegal, but that the search violated the defendant's legitimate expectation of privacy in the area searched); Rakas, *supra*, 439 U.S. at 140 (since the Fourth Amendment protects personal rights, a government search that does not invade an area in which the defendant has a legitimate expectation of privacy does not violate the defendant's fourth amendment rights). To confer standing under the federal



standard, the defendant's expectation of privacy must be both (1) subjectively held; and (2) reasonably justified. Rakas, *supra* at 143 & n.12.

Under Article I, Section 8 of the Pennsylvania Constitution, however, this Court looks to several additional factors to determine whether a criminal defendant has standing to challenge the admission of evidence against him. To gain standing to challenge the admission of evidence at a criminal trial, a Pennsylvania defendant must prove that (1) he was present on the premises at the time the police searched it or seized evidence from it; or (2) he has a possessory interest in the evidence seized; or (3) the offense with which he is charged includes "possession" at the time of the contested search as an essential element of the prosecution's case; or (4) he has a proprietary or possessory interest in the searched premises. Commonwealth v. Peterkin, 511 Pa. 299, 309-311, 513 A.2d 373, 378 (1986), cert. denied, 479 U.S. 1070 (1987); Commonwealth v. Treftz, 465 Pa. 614, 621-622, 351 A.2d 265, 268, cert. denied, 426 U.S. 940 (1976) (*adopting* Brown v. United States, 411 U.S. 223 (1973)).

Here, although Melendez or even Santiago may have been able to assert a colorable standing claim on the instant facts, appellant could not assert any interest sufficient to confer upon him the standing necessary to challenge the admission of the evidence against him under the above four-pronged test. First, appellant was not "present" on the "premises" of the blue Lincoln at the time the police searched its trunk because appellant was not a passenger in the car but was in fact standing away from the car at the time of his arrest and the search of the trunk. See Commonwealth v. Gallagher, 276 Pa. Super. 593, 595-597, 419 A.2d 616, 618-619 (1980) (since appellant was not a passenger of the van at

the time the police searched the van, appellant was not "present" at the premises searched). See also Commonwealth v. Johnson, 431 Pa. Super. 291, 297, 636 A.2d 656, 659 (1994), *appeal denied*, ___ Pa. ___, 651 A.2d 534 (1994) (defendant abandoned reasonable expectation of privacy in bag containing contraband by placing it in a tree in a public park and standing 10 to 12 feet away and approaching bag only to show crack cocaine in bag to potential customer).

Second, appellant cannot reasonably assert any possessory interest sufficient to give him standing in the cocaine seized from the trunk of the car. The car belonged to Melendez and appellant's access to the car was regulated by Melendez and Santiago. Appellant could not assert a reasonable claim to a possessory interest in the cocaine inside the trunk of the car since access was controlled by others.

Third, the offense with which appellant was charged did not include possession at the time of the contested search and seizure as an essential element of the prosecution's case. The Commonwealth charged appellant only with delivery of a controlled substance, not possession, and with criminal conspiracy as a result of his delivery of a controlled substance to Melendez. When a person "meaningfully abdicates his control, ownership or possessory interest" in a possession he no longer has a Constitutionally protected interest in that possession. Commonwealth v. Sell, 504 Pa. 46, 67, 470 A.2d 457, 469 (1983).[1] Once appellant delivered the

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[1]In Sell, this Court declined to abrogate the doctrine of automatic standing as the United States Supreme Court had done in United States v. Salvucci, 448 U.S. (continued...)



controlled substance to Melendez and Santiago, he had surrendered his interest therein and was no longer entitled to the constitutional protection against search and seizure afforded personal property. See also Pennsylvania Standard Criminal Instructions §16.13(a)(30)(B) (Pa. Bar Inst. 1980) (noting no provision for the defendant's possession of a controlled substance necessary to convict the defendant of delivery of a controlled substance).

In Peterkin, *supra*, this Court held that the appellant had no standing to challenge the search of the home of an acquaintance in which a firearm was found because the only possessory crime with which he was charged was possession of an instrument of crime in the commission of a robbery and double murder. This Court determined that the appellant was not entitled to automatic standing because the Commonwealth's case against him on that possessory crime was not dependent on the appellant's possession of the firearm at the time of the search, but rather depended on his possession of the firearm at the time of the murders and robbery. Under this analysis, whether appellant in the case *sub judice* possessed the controlled substance at some point before he delivered it to Melendez is irrelevant for the purposes of automatic standing. Because appellant did not actually or constructively possess any controlled

---

[1](...continued)
128 (1978). The appellant in that case had been charged with receiving stolen property. This Court held that the appellant had automatic standing because possession was an essential element of the crime charged. That holding was based on the fact that receiving, by definition, entails the acquisition of possession. Delivery, on the other hand, entails surrendering possession to another.

substance at the time of the contested search he is not entitled to automatic standing under this prong.

Finally, appellant cannot claim any proprietary interest in the automobile because Melendez owned the blue Lincoln, not appellant. Further, appellant cannot claim any possessory interest in the car because Melendez, the car's owner, controlled access to the trunk of the car. Even when Melendez left the scene, he left the keys to the car with Santiago, not appellant. Although Santiago later directed appellant to open the trunk of the car to put another plastic bag into the trunk, appellant complied with his instructions and then immediately returned the keys to Santiago. Since the owner of the car, Melendez, entrusted the keys to the car only to Santiago and since appellant only had access to the keys and to the trunk of the car at Santiago's discretion, appellant cannot reasonably claim any possessory interest in the car or contents therein. See Peterkin, *supra* (appellant had no proprietary or possessory interest in the home of an acquaintance).

Accordingly, under Peterkin, appellant cannot assert any interest sufficient to confer standing to challenge the admission of the cocaine into evidence at his criminal trial. On this basis, the majority opinion erred in considering the underlying merits of appellant's suppression claim.

Even if appellant has standing to challenge the search, he nevertheless does not have a reasonable expectation of privacy in the items seized or the place searched that would warrant suppression. Peterson, *supra*. In order to invoke the remedy of suppression, appellant



> must demonstrate that he held such a privacy interest which was actual, societally sanctioned as reasonable, and justifiable in the place invaded that the warrantless entry of the police violated his right under the Constitution of this Commonwealth, Article 1, Section 8, to be 'secure ... against unreasonable searches and seizures.'

Id. (citation omitted). Because appellant did not have a possessory or proprietary interest in the place searched or the items seized and was not present when the search was conducted, he did not have a legitimate expectation of privacy which would entitle him to suppression of the cocaine. Therefore, even if appellant had standing to challenge the search and seizure, he is not entitled to suppression. Id. (appellant is not entitled to suppression of items seized in search of abandoned storefront because he did not have an expectation of privacy which society recognizes as legitimate); Commonwealth v. McCullum, 529 Pa. 117, 134, 602 A.2d 313, 321 (1992) (appellant is not entitled to suppression of items seized in search of another's home because he did not have a legitimate expectation of privacy in the premises searched).

Unfortunately, the majority's decision vastly expands the reach of the privacy protections of the Pennsylvania and United States Constitutions to areas where it is not warranted -- that is, to situations where a defendant has no legitimate expectation of privacy, has no ownership interest at stake and was not present at or in the location searched at the time of the search. In so doing, a criminal in Pennsylvania now arguably even has standing to challenge drugs he delivered to another person but were then seized from that person by a police

officer. This decision gives unwarranted protection to the purveyors of death in Pennsylvania's communities and effectively ties the hands of law enforcement in its efforts to root out the scourge of drugs in our society. I therefore respectfully dissent.



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| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYL- |
| Appellant | : | VANIA |
| VS | : | |
| | : | No. 01276 |
| EDWIN LABRON | : | Philadelphia 1992 |

Appeal from the Order Entered March 5, 1992 in the Court of Common Pleas of Philadelphia County, Criminal No. 9009-2318-19

BEFORE: CIRILLO, KELLY and HESTER, JJ.

**J U D G M E N T**

**ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of Philadelphia County be, and the same is hereby REVERSED.**

**BY THE COURT:**

**/s/ David A. Szewczak**
**PROTHONOTARY**

Dated: January 6, 1993

| | | |
|---|---|---|
| COMMONWEALTH OF PENNSYLVANIA | : | IN THE SUPERIOR COURT OF PENNSYL- |
| Appellant | : | VANIA |
| VS | : | |
| | : | No. 01276 |
| EDWIN LABRON | : | Philadelphia 1992 |

Appeal from the Order Entered March 5, 1992 in the Court of Common Pleas of Philadelphia County, Criminal No. 9009-2318-19

BEFORE: CIRILLO, KELLY and HESTER, JJ.

MEMORANDUM: FILED JAN 6 1993

This is an appeal by the Commonwealth from an order suppressing the evidence seized during a warrantless search of a parked automobile. The Commonwealth has certified that the suppression order terminates or substantially handicaps its case. Commonwealth v. Dugger, 506 Pa. 537, 486 A.2d 382 (1985). We reverse.

The Commonwealth asks whether the trial court erred when it found that cocaine seized from a parked car was seized pursuant to an unreasonable search and seizure and was, therefore, not admissible at trial.

When we review an order suppressing evidence, we are bound by the reasonable factual findings of the suppression court, Commonwealth v. Hamlin, 503 Pa. 210, 469 A.2d 137 (1983); however, we must reverse if we find an error of law. Commonwealth v. Cortez, 507 Pa. 529, 491 A.2d 111, cert. denied, 474 U.S. 950 (1985). We must first determine whether the suppression court's factual findings and legal conclusions are



supported by the record. Commonwealth v. Lopez, ___ Pa. Super. ___, 609 A.2d 177 (1992) (citing Commonwealth v. Vinson, 361 Pa. Super. 526, 522 A.2d 1155 (1987)). To determine whether the findings of fact are supported by the record, we review only the evidence of the appellee and so much of the evidence of the appellant which, when read in the context of the record as a whole, remains uncontradicted. Commonwealth v. Reddix, 355 Pa. Super. 514, 513 A.2d 041 (1986) (citation omitted). If the factual findings are supported by the record, then we may reverse only for an error of law. Id.

With that standard of review in mind, we turn first to the findings of fact by the trial court. An undercover police officer, Gerald Nimmo, conducted an intensive investigation of reports he received of drug dealing in the 900 block of Auburn Street, Philadelphia. Prior to August, 1990, Officer Nimmo had made five arrests for drug violations on that block. Between his sources and his own observations, Officer Nimmo concluded that there was reason to believe that Rafael Melendez was the manager of a team of retail drug sellers, one of whom is the defendant in this case, Edwin Labron, operating in the 900 block of Auburn Street. His information was that Melendez was using a 1977 blue Lincoln to store the drugs until his sellers needed to be re-supplied.

During a two-hour surveillance of the block of Auburn Street, Nimmo watched Labron and another man, identified only as Santiago, conduct a vigorous retail trade in cocaine, exchanging small, clear plastic packets filled with white powder for currency. Nimmo estimated that he saw Labron and Santiago sell 100 packets of cocaine to fifty customers. Officer Nimmo also saw Melendez approach the two men and then walk

with them to the blue Lincoln. Melendez opened the trunk of the the Lincoln with a key, reached into the right side of the trunk, and removed a large plastic bag. The bag contained smaller plastic bags each filled with small packets of white powder. Melendez handed the plastic bags to Labron and Santiago and received cash in exchange. Labron and Santiago then resumed retail sales on the street. A second exchange of plastic bags from the Lincoln for money occurred a short while later. Then Melendez gave Santiago a key and drove away in another vehicle. Ten minutes later two more men drove up in a blue Toyota. Santiago gave Labron a key, Labron opened the trunk of the Lincoln, the men in the Toyota gave Labron a plastic bag which Labron put in the right rear of the trunk, closed the lid, and returned the key to Santiago. The men in the Toyota drove away. Officer Nimmo radioed for back up officers who arrested Labron and Santiago. Another officer forced the trunk lid open and recovered two plastic bags of cocaine and a plastic baggie with five clear packets of cocaine.

The Fourth Amendment to the U.S. Constitution and Article I, Section 8 of the Pennsylvania Constitution protect citizens from "unreasonable searches and seizures." Evidence derived from an unreasonable search or seizure is inadmissible at trial. U.S. v. Katz, 389 U.S. 347 (1967). A search without a warrant is generally unreasonable. Mapp v. Ohio, 367 U.S. 347 (1961); Commonwealth v. Bosurgi, 411 Pa. 56, 190 A.2d 304 (1963) cert. denied, 375 U.S. 910 (1963). Police may not search a home or any place in which a person has a reasonable expectation of privacy without a warrant. Katz, 389 U.S. at 357. A warrant is obtained after a neutral magistrate finds that probable cause exists for a search for evidence of a crime. Aguilar v. Texas, 378 U.S. 108, 109 (1964). Probable cause is a product of a



totality of the circumstances presented to the magistrate. Illinois v. Gates, 462 U.S. 213, 230 (1983). See also Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991).

There are, however, exceptions to the warrant requirement. One is the automobile exception. Automobiles are excepted from the warrant requirement because they are inherently mobile and citizens have a lower expectation of privacy in their cars than in their homes. Commonwealth v. Milyak, 508 Pa. 2, 493 A.2d 1346 (1985). There is a lowered expectation of privacy in a vehicle because it is regulated, inspected periodically, licensed and routinely stopped by police for violations. California v. Carney, 471 U.S. 386 (1985). Where there is a diminished expectation of privacy a warrant is not required before the police may search. Oliver v. United States, 466 U.S. 170 (1984) ("No trespassing" signs and fences do not create a reasonable expectation of privacy sufficient to defeat the "open fields" doctrine). Under the automobile exception an officer may search a car if he has independent probable cause to believe the automobile has been used in the furtherance of a felony or contains contraband or evidence of a crime. Milyak, supra.

The suppression court found that although Officer Nimmo had probable cause to believe that illegal drugs were in the trunk of the Lincoln, the Commonwealth had failed to establish exigent circumstances to justify a warrantless search. The trial court relied on language in recent Pennsylvania Supreme Court decisions regarding the warrantless searches of automobiles to reason that the Commonwealth must demonstrate some reason, some exigent circumstance, which prevented obtaining a warrant. The suppression court misapprehends the law of automobile searches.

The trial court opinion relies on two recent decisions of our supreme court to detail what exigent circumstances would, it believed, justify a warrantless automobile search. The trial court details the facts of Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991), in which the warrantless search of a car was justified based on information from reliable informants and police surveillance and reads the case as finding that the unknown make of the vehicle, its unpredictable location, and the fact that the vehicle was moving when stopped justified the warrantless search. The suppression court, however, misapprehends the initial question in the Rodriguez case which was whether there was "sufficient probable cause" to conduct the search of the vehicle in the case. Id. at 270, 585 A.2d at 989. The supreme court upheld this court's finding that "both probable cause and exigent circumstances existed to justify the warrantless search of appellant's automobile." Id. at 275, 558 A.2d at 991. The supreme court did not then hold, nor will we now hold, that both probable cause and separate exigent circumstances are necessary to conduct a warrantless search of an automobile. In fact, the reasoning which would have required the police to obtain a warrant before searching the vehicle was a dissent in the Rodriguez case which received only two other votes.

Probable cause is a necessary pre-condition to any search; probable cause is necessary to obtain a warrant and probable cause is necessary to conduct a warrantless search under any of the exceptions to the warrant requirement. The suppression court quotes as "unequivocal" language that:

> It is well-established that automobiles are not per se unprotected by the warrant requirements of the Fourth Amendment,



> and of Article I, § 8 of the Pennsylvania Constitution. Nevertheless, certain exigencies may render the obtaining of a warrant not reasonably practical under the circumstances of a given case, and, when that occurs, vehicle searches conducted without warrants have been deemed proper where probable cause was present.

Commonwealth v. Baker, 518 Pa. 145, 148, 541 A.2d 1381, 1383 (1988).

Neither the quoted language nor the Baker case itself stand for the proposition that a warrant is required to search a vehicle absent exigent circumstances. The quoted language, that vehicles are not per se unprotected by the warrant requirements, should rather be read to say that any search must rest on probable cause, that probable cause must be present before any search, including a search of a vehicle. Further reading of the quoted language moves directly into the exigent circumstances exception to the warrant requirement and concludes that automobiles present exigent circumstances in which probable cause is sufficient to justify a warrantless search. The language should not and cannot be read to create an exigent circumstances test for a warrantless search of an automobile. In Baker the supreme court upheld the warrantless search of a parked car which the driver/defendant had left and which was surrounded by police. The court held in Baker, "Since probable cause to search the vehicle was present, a search warrant was not required." Id. at 148, 541 A.2d at 1384.

We would do violence to the law and to the practicalities of law enforcement if we required the police and the Commonwealth to prove exigent circumstances above and beyond the inherent mobility of a

vehicle before conducting a warrantless search of an automobile. The automobile exception rests on lowered expectations of privacy and the exigent circumstances that a vehicle is inherently mobile. See Carroll v. United States, 257 U.S. 132 (1925); United States v. Ross, 456 U.S. 798 (1982); Milyak, supra. It is not, however, the actual mobility of an automobile which creates the automobile exception; a vehicle is presumed to be mobile. See Milyak, supra; Commonwealth v. Elliot, ___ Pa. Super. ___, 611 A.2d 731 (1992) (warrantless search at the police station upheld); Commonwealth v. Hoffman, 403 Pa. Super. 530, 589 A.2d 737 (1991) (vehicle searched without a warrant after the car was parked and the driver in custody). It would be an intolerable burden to demand that our police officers determine whether a vehicle was actually driveable before searching without a warrant. California v. Carney, 471 U.S. 386 (1985). The automobile exception to the warrant requirement demands only that an officer have probable cause to believe that evidence of a crime or contraband will be found within the vehicle to reasonably search.[1] If the police have probable cause to search and automobile they may search all of the

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[1]We note that automobiles also may be searched under wholly different rationales, such as to protect the safety of a officer who has detained a driver or passenger. Michigan v. Long, 463 U.S. 1034 (1983). Or, an officer may search the passenger compartment incident to arrest. New York v. Belton, 453 U.S. 454 (1981). Police may also invoke the "plain view doctrine" when they spot contraband in a vehicle. New York v. Class, 475 U.S. 106 (1986) (no search when officer spotted butt of a gun when legitimately checking vehicle identification number). See also Commonwealth v. Robinson, 399 Pa. Super. 199, 582 A.2d 14 (1990).



automobile where and when they choose and need not demonstrate that exigent circumstances prevented them from obtaining a warrant for the search. Probable cause to search an automobile is probable cause to search without a warrant. Chambers v. Maroney, 399 U.S. 42 (1970).

Thus, the question becomes did Officer Nimmo have probable cause to believe the vehicle contained contraband or evidence of a crime. Probable cause is defined as "a substantial basis for concluding that a search would uncover evidence of wrongdoing." Gates, 462 U.S. at 236. The level of probable cause needed to invoke the automobile exception to the warrant requirement is the same as the probable cause needed for a warrant. Milyak, 508 Pa. at 10, 493 A.2d at 1350.

We note that this case is distinguishable from Lopez, supra, a case recently decided by a panel of this court. In Lopez, after an initial lawful stop, the officer pressed his investigation on no articulable basis. This court held in Lopez that the ensuing search was unreasonable. In this case the probable cause is patent and proved. Officer Nimmo watched the Lincoln being used as a wholesale warehouse for drugs and saw the trunk opened and drugs put in or taken out three times.

Thus, we find that Officer Nimmo had probable cause to search the vehicle, Milyak, supra. With probable cause to search the vehicle, he could search any part of the vehicle, Ross, supra, and the Commonwealth did not need to demonstrate any exigent circumstance beyond that inherent in a motor vehicle.

Order reversed.

**IN THE COURT OF COMMON PLEAS OF PHILADELPHIA COUNTY**
**FIRST JUDICIAL DISTRICT OF PENNSYLVANIA**
**CRIMINAL TRIAL DIVISION**

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| | | |
|---|---|---|
| **COMMONWEALTH OF PENNSYLVANIA** | : | **SEPTEMBER TERM, 1990** |
| **v.** | : | |
| **EDWIN LABRON** | : | **NOS. 2318-19** |

- - -

**FILED**
**JULY 31 1992**
**COMMON PLEAS**
**COURT-PHILA.**
**APPEALS UNIT-**
**ROOM 601 C.H.**

## OPINION

### Procedural History

Defendant Edwin Labron was charged with delivery of a controlled substance in violation of 35 P.S. §780-113(30) and with criminal conspiracy in violation of 18 Pa. C.S.A. §903. On November 20-21, 1991, this Court conducted a hearing on a motion to suppress physical evidence filed by Defendant, and on March 5, 1992, this Court granted Defendant's motion to suppress. The Commonwealth now appeals, contending in its Statement of Matters Complained of on Appeal that this Court erred in granting Defendant's motion to suppress physical evidence. For the reasons set forth below, this Court believes that the Commonwealth's appeal is without merit.



### Findings of Fact

The credible evidence at the hearing on the motion to suppress established that a considerable time prior to noon on August 24, 1990, Philadelphia police officer Gerald Nimmo received information that led him to believe that a Raphael Melendez, acting with others, was selling cocaine in the 900 block of Auburn Street in Philadelphia (N.T. 85).[1] Specifically, Officer Nimmo testified:

> A. I had information that Raphael Melendez lived at 913 Auburn Street. He was the one that had the workers on the street and that he had received, he would receive his cocaine. It would be delivered on Auburn Street and he used several cars to store the stuff. One was a Lincoln. There was another car on the north side of the street. I don't recall what that was now. It was an abandoned car. There was no tags on that.
>
> Q. And when did you get that information?
>
> . . . .
>
> THE WITNESS: I had gotten that information from numerous, from several places, from my own investigation, from other people that had been arrested, from people that called from the neighborhood.

[1]Unless otherwise indicated, all references to the notes of testimony are to the notes of testimony for November 20, 1991.

BY MR. GAY:

Q. And how long had you had that information before you went to make your surveillance that day?

A. I had been doing surveillances on that street.

Q. I beg your pardon?

A. I had been doing surveillances on that street and I had made several arrests, other arrests. (N.T. 85-86)

Officer Nimmo testified that he had made five arrests in the 900 block of Auburn Street in the six-week period preceding August 24, 1990. (N.T. 7)

Officer Nimmo further testified:

"Q. Is it your testimony that before you went out to Auburn Street you had specific information about this Lincoln automobile before you got there that day?

A. That and another car, yes, sir." (N.T. 138)

At approximately noon on August 24, 1990, Officer Nimmo began a surveillance of the 900 block of Auburn Street. (N.T. 8) A team of approximately ten other officers was in close proximity to the 900 block of Auburn Street to act as Officer Nimmo's backup. (N.T. 95)



Officer Nimmo continued his surveillance for approximately two hours. (N.T. 119-22) During the course of this surveillance, Officer Nimmo observed a blue 1977 Lincoln automobile parked on the south side of the 900 block of Auburn Street. (N.T. 11-12) In the 900 block of Auburn Street, Officer Nimmo also saw Defendant and another male named Santiago exchanging small clear plastic packets filled with white powder for United States currency with numerous persons. (N.T. 9) Based upon his observations and his extensive experience as a narcotics officers, Officer Nimmo reasonably believed that the packets contained cocaine. (N.T. 9-10)

From his surveillance location, Officer Nimmo later observed Raphael Melendez approach Defendant and Santiago and the three men walked to the blue Lincoln parked on Auburn Street. (N.T. 11-12) Melendez opened the trunk of the Lincoln with a key, reached into the right rear side of the trunk, and removed a large plastic bag. This bag contained smaller clear plastic baggies, each filled with small packets of white powder. (N.T. 12-13) Based upon his observations and experience as a narcotics officer, Officer Nimmo reasonably believed that the packets contained cocaine. (N.T. 13) Melendez handed the baggies filled with packets to Defendant Labron and to Santiago, received United States currency from them, and closed the trunk. (N.T. 12-13) Santiago and Defendant Labron then continued to make numerous exchanges of the white powder-filled packets for United States currency.

Sometime thereafter, Melendez again went to the blue Lincoln, received money from Defendant Labron and Santiago, and handed each of time a clear plastic bag containing packets of white powder which he retrieved from the right rear of the trunk. (N.T. 14) Several minutes later Melendez approached Santiago,

handed him a key, and drove away in another vehicle. Santiago and Defendant Labron continued to make their exchanges of the packets. (N.T. 14-15)

Approximately ten minutes later, Richard Ramos and Luis Lajara arrived in the 900 block of Auburn Street in a blue Toyota. Santiago then gave Defendant Labron a key which Defendant used to open the trunk of the blue Lincoln. (N.T. 16) Lajara removed a plastic bag from the Toyota and walked over to Labron who was waiting near the open trunk of the Lincoln. Labron received the bag, placed it in the right rear of the trunk of the Lincoln, closed the trunk, and gave the key back to Santiago. (N.T. 18) Ramos and Lajara then got back into the Toyota and drove away. Officer Nimmo radioed his backup officers, including Officer Kenneth Adams, who arrested Ramos and Lajara in the Toyota several blocks away from the 900 block of Auburn Street. (N.T. 11/21/91, 21)

At Officer Nimmo's direction, several other officers proceeded to the 900 block of Auburn Street and arrested Defendant and Santiago. (N.T. 19) Also at Officer Nimmo's direction, police officer Salvatore Scarpato forced open the trunk of the blue Lincoln. (N.T. 11/21/91, 6-7) From the right rear quarter panel of the trunk of the Lincoln the officer recovered two plastic bags containing alleged cocaine and a plastic sandwich baggie containing five clear packets containing alleged cocaine. (N.T. 11/21/91 at 7)

**Discussion**

There can be no dispute that Officer Nimmo had probable cause to believe that illegal drugs were within the trunk of the blue Lincoln parked in the 900 block of Auburn Street. Accordingly, the only issue in this case



is whether under the particular facts and circumstances of this case the police were required to obtain a search warrant before searching the trunk of the blue Lincoln.

It should first be noted that warrantless searches of automobiles are not per se lawful merely because the police have probable cause to believe that contraband is within the vehicle. Instead, our Pennsylvania Supreme Court has recently held in unequivocal language that:

> It is well-established that automobiles are not per se unprotected by the warrant requirements of the Fourth Amendment, and of Article I, §8 of the Pennsylvania Constitution. Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101 (1978). Nevertheless, certain exigencies may render the obtaining of a warrant not reasonably practicable under the circumstances of a given case, and, when that occurs, vehicle searches conducted without warrants have been deemed proper where probable cause was present."

Commonwealth v. Baker, 518 Pa. 145, ___, 541 A.2d 1381, 1383 (1988).

Further, it should be noted that it is also well-established that the Commonwealth has the burden of proving by a preponderance of the evidence that any physical evidence which they desire to introduce was obtained without violation of the defendant's constitutional rights. Pa. R. Crim. P. 323(h). Commonwealth v. Weik, 360 Pa. Super. 560, ___, 521 A.2d 44, 45 (1987); Commonwealth v. Rispo, 338 Pa. Super. 225, ___, 487 A.2d 937, 938 (1985); Commonwealth v. Eliff, 300 Pa. Super. 423, 446 A.2d 927, 929 (1982);

Commonwealth v. Davis, 270 Pa. Super. 202, 411 A.2d 250 (1979).

In the case at bar, this Court believes that the Commonwealth failed to meet their burden of establishing by a preponderance of the evidence that any exigencies existed which would justify the warrantless search of the trunk of the blue Lincoln.

Two recent decisions of the Pennsylvania Supreme Court have considered in some detail what exigent circumstances justify warrantless automobile searches - Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991), and Commonwealth v. Baker, supra. This Court believes that a close analysis of Rodriguez and Baker reveals that none of the factors pointed to by the Supreme Court in those cases to establish exigent circumstances were present in the case at bar.

In Commonwealth v. Rodriguez, supra, our Supreme Court specifically found that "exigent circumstances existed to justify the warrantless search of appellant's automobile." 526 Pa. at ___, 585 A.2d at 991. In Rodriguez, the police stopped a car which was being driven on a highway and conducted a search of the vehicle. In finding that exigent circumstances existed, the Supreme Court pointed to three particular factors which excused the police from obtaining a search warrant, none of which were present in the case at bar. First, the Court in Rodriguez noted that prior to the car stop, the police did not have sufficient information to identify the particular vehicle in which contraband would be located. 526 Pa. at ___, 585 A.2d at 990-91. In the case at bar, the police knew before they set up their surveillance that the blue Lincoln was being used by Melendez in the distribution of illegal drugs.



Second, in Rodriguez, the Supreme Court pointed out that the police did not know precisely where the vehicle containing the drugs would be located on the day that the stop and search were conducted. 526 Pa. at ___, 585 A.2d at 991. In the case at bar, the police had advance information prior to establishing their surveillance as to precisely where the blue Lincoln would be located. Finaliy, in Rodriguez, the Court pointed out that the police stopped a moving vehicle, and then conducted their search. 526 Pa. at ___, 585 A.2d at 991. In the case at bar, the blue Lincoln vehicle was stationary, and the Commonwealth did not attempt to present any evidence to establish whether the vehicle even appeared to be mobile.[2]

In Commonwealth v. Baker, supra, the police also stopped a moving vehicle and searched it approximately thirty minutes after receiving information that the driver of the vehicle possessed a gun. As it did in Rodriguez, the Supreme Court in Baker relied upon several factors in finding that exigent circumstances existed, none of which were present in the case at bar. In Baker, the Supreme Court pointed to the fact that the police stopped a "moving vehicle." 518 Pa. at ___, 541 A.2d at 1381. In Baker, the Court also pointed to the lack of information which the police had as to a particular vehicle being in a particular location until shortly before the car stop was made, stating:

> This is not a case where police knew hours in advance that a particular vehicle carrying evidence of crime would be

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[2]Although the police apparently could not start the blue Lincoln, this Court established by its own questions that the vehicle appeared to be mobile. (N.T. 137-38)

> parked in a particular locale, such that it would have been reasonably practical to obtain a search warrant before encountering the vehicle to be searched.

518 Pa. at ___. 541 A.2d at 1383. In the case at bar, the police appear to have known well in advance of their search that a particular vehicle, the blue Lincoln, carrying evidence of a crime would be parked in a particular location, the 900 block of Auburn Street.

In summary, unlike Baker and Rodriguez, the police in the case at bar did not search a vehicle that they had stopped while it was moving. Moreover, unlike Baker and Rodriguez, the case at bar was not an instance where the police searched a vehicle that was suddenly or unexpectedly encountered. Instead, in the case at bar, Officer Nimmo knew well before he set up his surveillance on August 24, 1990, that the blue Lincoln was being used in connection with the sale and distribution of cocaine.[3] The Commonwealth offered absolutely no testimony to attempt to establish that the information the police had about the Lincoln prior to setting up the surveillance on August 24, 1990, was insufficient to obtain a search warrant for the blue Lincoln. Since it is the Commonwealth's burden to establish by a preponderance of the evidence that any physical evidence to be introduced was recovered without violation of the defendant's constitutional rights, this

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[3]Accordingly, the case at bar is distinguishable from Commonwealth v. Jenkins, 401 Pa. Super. 580, 585 A.2d 1078 (1991), where there was apparently no evidence that the police had any information about the vehicle they searched prior to setting up their surveillance.



Court believes that it would be highly improper to presume, without any evidentiary basis for such a presumption, that there was any impediment to the police in obtaining a search warrant for the blue Lincoln prior to setting up their surveillance on August 24, 1990.

For the reasons set forth above, this Court found that the Commonwealth did not meet its burden of establishing exigent circumstances to justify the warrantless search, and this Court believes that it properly granted Defendant's motion to suppress the evidence recovered from the trunk of the blue Lincoln.

**BY THE COURT:**

**/s/**
**G. CRAIG LORD, J.**

**Dated: July 31, 1992**

EDITOR'S NOTE

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95-1691

Supreme Court, U.S.
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NO. _____

**IN THE**
**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1995**

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

EDWIN LABRON

On Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

**APPENDIX - VOLUME II**

RONALD EISENBERG
Deputy District Attorney
(Counsel of Record)
JOAN WEINER
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
ARNOLD GORDON
First Assistant District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

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IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

- - -

COMMONWEALTH :
vs. :
EDWIN LABRON : No. 9009-2318
-and-
RICHARD RAMOS : No. 9009-2300
-and-
LUIS LAJARA : No. 9009-2314

- - -

Courtroom 254 City Hall
Philadelphia, Pennsylvania
Wednesday, November 20, 1991

- - -

BEFORE: HONORABLE G. CRAIG LORD, J.

- - -

APPEARANCES:

GINO MECOLI, ESQ.
Assistant District Attorney
Counsel for the Commonwealth

VINCENT CORRIGAN, ESQ.
Defender Association
Counsel for Defendant Labron

ALLAN SAGOT, ESQ.
Counsel for Defendant Ramos

ANDREW GAY, ESQ.
Counsel for Defendant Lajara

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**PRETRIAL MOTIONS**
**(VOLUME I)**



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PROCEEDINGS.

THE COURT: Is Nimmo here yet?

MR. MECOLI: No, Your Honor.

THE COURT: Is there any testimony that you can put on before he gets here?

MR. MECOLI: No, your Honor. He's the witness in this case. The officers are just for confiscations. He did all the other work on the case.

(A brief recess was taken.)

MR. MECOLI: Your Honor, I have some good news. Nimmo's here.

THE COURT: Are you ready to proceed?

MR. MECOLI: Yes, Your Honor.

THE COURT: Could counsel for the defendant please state what it is, what the motion is and what's the legal basis for it, what's sought to be suppressed?

MR. GAY: May it please the Court. With respect to Mr. Lajara, for whom I have filed this pretrial motion including the motion to suppress physical evidence, I move to suppress certain United States currency that was allegedly found upon Mr. Lajara's person as a result of an illegal arrest.

THE COURT: Without probable cause; is that correct?



MR. GAY: Yes, sir, without probable cause, and without reasonable suspicion to believe that the defendant was armed and dangerous and about to commit a criminal offense.

THE COURT: Is this an arrest that occurred on the street, in a house? What are we talking about?

MR. GAY: It occurred while Mr. Lajara was in a motor vehicle, Your Honor.

THE COURT: In a car. All right.

Now, I assume that some of the other counsel are seeking to suppress something else?

MR. SAGOT: May it please the Court, Your Honor, on behalf of the record, Your Honor. We also move to suppress any physical evidence based upon an illegal arrest at the scene. He's also the occupant of the vehicle.

THE COURT: Okay. Mr. Corrigan?

MR. CORRIGAN: Your Honor, I'm appearing on behalf of Edwin Labron. I would join in counsel's motion and I would also add that in addition to this being an illegal arrest, there was also a search conducted at the scene with, there was no, it was committed without a warrant.

THE COURT: Search of what?

MR. CORRIGAN: It was a parked motor vehicle and that the search took place without a warrant, and again without reasonable suspicion or probable cause. I

would add that my motion would be based on both the Pennsylvania state and United States Constitutions.

MR. GAY: As is mine, as the motion says, Your Honor.

MR. SAGOT: And I would join in the addition that counsel has made regarding my own motion as well, Your Honor.

THE COURT: Is that adequate for the Commonwealth's purposes?

MR. MECOLI: Yes, it is, Your Honor.

THE COURT: Who would be the first Commonwealth witness on the motion?

MR. MECOLI: Officer Nimmo, Your Honor.

THE COURT: I'll direct that all other Commonwealth and defense witnesses be sequestered.

COURT CRIER: Place your right hand on the Bible. State your full name. Spell the last name. Badge number, district or division.

THE WITNESS: That's officer Gerald Nimmo. N-I-M-M-O. 9638, Philadelphia Police Narcotics Unit.

OFFICER GERALD NIMMO, after having been duly sworn, was examined and testified as follows...

DIRECT EXAMINATION

BY MR. MECOLI:



Q. Officer, I'd like to direct your attention back to August twenty-fourth, 1990, at approximately 2:18 p.m., in the vicinity of the 900 block of West Auburn Street in the City of Philadelphia. Were you at that location and on duty as a Philadelphia police officer at that date and time?

A. Yes, sir.

Q. And at that date and time and location, did you observe anyone you see here today?

A. Three males behind defense counsel: The one in the purple, the one in the plaid. I can't see his shirt.

Q. Officer, are you familiar with the location of 900 block of West Auburn Street?

A. Yes, sir. I'd made numerous arrests there.

Q. Numerous arrests for what, Officer?

A. Narcotics.

Q. Could you tell us how many, approximately?

MR. SAGOT: Objection.

MR. GAY: Objection.

MR. CORRIGAN: Objection.

THE COURT: What grounds?

MR. SAGOT: Irrelevant. Absolutely irrelevant, Your Honor.

THE COURT: Well, it may be relevant to his observations. I'll overrule the objection. How many arrests?

THE WITNESS: In that block? Had to be at least five on that block.

MR. SAGOT: I'm sorry.

THE WITNESS: At least five on that block. That's just low.

BY MR. MECOLI:

Q. And what time period are we talking about, those five arrests?

A. Six weeks.

THE COURT: Six weeks when?

THE WITNESS: Prior to this.

THE COURT: Thank you.

BY MR. MECOLI:

Q. Could you tell us what you observed at that date, time and location that brings you here to court today.

A. If Your Honor please, on that date and time, I was assigned to Narcotics Unit working plainclothes. I was at a confidential surveillance location, at which time it was approximately 12:18 I initiated the surveillance. I observed defendant on the far right, I believe with the interpreter, and another male, an older hispanic male.



THE COURT: Let's just clarify this. When you say you observed defendant on the far right, are you pointing to the defendant who's sitting next to the female interpreter?

THE WITNESS: Next to the female, yes, sir.

THE COURT: Can we agree that for the record he is identifying Mr. Corrigan's client, Mr. Labron? Is that correct? Fine. So you observed Mr. Labron do what?

THE WITNESS: Yes, sir. Him and another hispanic male, he was older, I believe his name was Santiago, they were out on the highway and they were being approached by black and hispanic males and exchanges were being made between them.

BY MR. MECOLI:

Q. Describe what you mean by exchanges.

A. They would accept US currency. In return, they would give the males small clear plastic packets which had white powder inside.

Q. Have you ever seen packets like this before?

A. I had made arrests with, in that block with identical type packets taken as evidence.

Q. At the time you saw, how many times have you seen packets like this before?

A. Again, I would say at least, at least five times.

THE COURT: How many times?

THE WITNESS: At least five times.

BY MR. MECOLI:

Q. How long, up to this date how long had you been a narcotics officer?

A. I'm with Narcotics 1981.

Q. And based on you experience and your knowledge of these packets, what did you believe they contained when you saw them?

A. I believe that they --

MR. SAGOT: I'd object, to this, Your Honor. There's no sufficient basis for the identification upon his expertise. I think a better description should be upon the record so Your Honor can decide it.

MR. MECOLI: Your Honor, I'm not offering his expertise. The question is what's in his mind.

THE COURT: I'll sustain it.

MR. GAY: Judge, his personal belief not based on expertise is of no consequence.

THE COURT: I'll give the testimony it's proper weight. I'm going to overrule the objection.

What did you believe to be in the packets?

THE WITNESS: I believed it to be cocaine.

BY MR. MECOLI:



Q. What happened next?

A. A hispanic male that's not here, who was later identified as Raphael Melendez --

THE COURT: Wait a second. Santiago, you mentioned Labron and Santiago. Do you see Santiago here?

THE WITNESS: No, sir.

THE COURT: All right. So now you're talking about a third male, right?

THE WITNESS: Yes, Sir.

THE COURT: What's the third male's name?

THE WITNESS: I believe his name is Raphael Melendez. He had an address of 913 West Auburn Street.

THE COURT: What did you see him do?

THE WITNESS: He came into view, had a conversation with the two males, Santiago and I believe it's Labron, Labaron, whatever.

BY MR. MECOLI:

Q. Do you see either of those people here today?

A. The one, yes, sir. He's speaking with the female interpreter.

THE COURT: We've already agreed that's Mr. Labron.

THE WITNESS: All right. Melendez talked with them, went over to a blue Buick that was parked on the south side of the street.

THE COURT: Who goes over to the blue Buick?

THE WITNESS: Melendez, Raphael Melendez. And tag number on the Buick was SNE349. It was a 1977 blue Lincoln. At this time, he opened the trunk of the Lincoln with a key.

THE COURT: Melendez does.

THE WITNESS: Melendez, yes sir. He reached in to the right quarter panel.

MR. SAGOT: I'm sorry, Judge. I got lost. It went from a Buick to a Lincoln. Maybe I didn't hear the testimony.

THE COURT: You did hear the testimony.

THE WITNESS: I couldn't hear you, counselor.

THE COURT: What kind of car was this?

THE WITNESS: It was a blue 1977 Lincoln.

THE COURT: So there was no Buick involved in this case.

THE WITNESS: No. Lincoln.

THE COURT: Originally you said Buick.

THE WITNESS: I'm sorry.



THE COURT: Okay. So Melendez opens the trunk with a key?

THE WITNESS: Yes, sir. He reached into the right rear quarter panel of the trunk. Inside was a plastic bag. He retrieved other plastic bags from inside that, brought them out, gave them to Santiago and Labaron or Labron, received US currency, and he walked out of --

THE COURT? From who?

THE WITNESS: From both males. He walked out of my view, out of my sight, at which time numerous Spanish and black males walked up to the two, Santiago and Labaron.

BY MR. MECOLI:

Q. These items that Mr. Melendez handed to them, could you describe them?

A. They would fit in the palm of your hand. They were clear plastic baggies containing small plastic, clear plastic packets inside.

Q. Have you seen those type packets before?

A. Numerous times, yes, sir.

Q. And based on your knowledge of seeing them before, what did you believe them to contain at this time?

A. I believed they, the baggies, contained packets of cocaine.

Q. What happened next?

A. Numerous males come up to him.

THE COURT: To who?

THE WITNESS: Santiago and Labaron. They received money. Santiago and Labaron received money and gave out plastic packets from the plastic baggies. Within a few minutes, they sold out. Melendez walked over to the blue Buick, blue Lincoln again, opened the trunk up, repeated the same thing, went to the right rear quarter panel, retrieved more baggies, come out, gave them to Santiago and Labaron again. They gave him US Currency, paper currency. Excuse me. They started to sell again. Within two minutes, three minutes, Melendez walked back to Santiago. He gave Santiago a set of keys. Melendez then walked to a blue Ford station wagon, I believe it was, a dark blue. He got in the station wagon and he went west on Auburn to --

THE COURT: Melendez does this?

THE WITNESS: Yes, sir.

THE COURT: He gets in what kind of car?

THE WITNESS: A blue Ford station wagon.

THE COURT: All right.

THE WITNESS: He goes west on Auburn. I'm sorry. East on Auburn and south on 9th Street out of my sight. The two males who were left at the location, Santiago and Labaron, continued exchanging paper currency for the packets that they had and approximately ten minutes after Melendez left, a blue Toyota pulled up,



Pennsylvania tag XZB583. It was a light blue Toyota with two hispanic males. The male with the purple shirt behind the defense counsel --

THE COURT: Indicating I think we can agree Mr. Ramos.

MR. MECOLI: I believe that's correct, Your Honor.

THE WITNESS: And the male in the white and gray longsleeved shirt.

THE COURT: Indicating Mr. Lajara.

THE WITNESS: Lajara, I believe. At which time they pulled up, I believe it was in front of the Lincoln. The one on the right in the white and gray, he was wearing a, like a gold shirt and pants.

THE COURT: Indicating Mr. Lajara.

THE WITNESS: Yes, sir.

THE COURT: What was he wearing?

THE WITNESS: A gold, it was a gold colored shirt and pants. I'm not. I remember it was gold combination. Both males got out of the vehicle. They walked up, talked to Santiago, the taller, older hispanic male, at which time the younger male Labaron walked over to him. Santiago gave him the keys. Labaron went over, opened the trunk.

THE COURT: Slow down. Labaron walked over to Santiago?

THE WITNESS: Received keys from Santiago.

THE COURT: All right.

THE WITNESS: Labaron went over, opened the trunk of the Lincoln with the keys that he had just received from Santiago. The male in the, Lajara, I believe his name is, the white and gray long-sleeved shirt.

THE COURT: Today. You mean what he's wearing today.

THE WITNESS: Yes, Sir.

THE COURT: Again indicating Mr. Lajara.

THE WITNESS: After the conversation, he walked back to the Toyota. He went in the passenger side and reached in the back of the passenger side.

BY MR. MECOLI:

Q. Did you see at this point what Mr. Ramos was doing?

A. Ramos was standing by the driver's side of the automobile. He was looking up and down the street just looking back and forth, and he was talking to Lajara. I don't know what they were saying. They were speaking Spanish.

THE COURT: But did you say Ramos was by the driver's side of the Toyota?

THE WITNESS: Correct. He was looking up and down the street and talking to Lajara.



BY MR. MECOLI:

Q. What happened next?

A. Lajara reached in, come out with a plastic bag, turned around, closed the door, walked to Labaron, Labron.

Q. Which person are you indicating now?

A. I'm sorry?

Q. Which person did he walk to?

A. The male talking with the female interpreter.

Q. Indicating Labron for the record.

THE COURT: All right. So let me just get this right. Lajara got a plastic bag. He did then what?

THE WITNESS: Walked back to, towards the Lincoln, gave that bag to Labaron or Labron. He placed it in the right rear quarter of the trunk of the Lincoln. He closed the trunk of the Lincoln. He gave Santiago the keys.

THE COURT: Labron closed the Lincoln trunk?

THE WITNESS: Correct, and returned the keys to Santiago.

BY MR. MECOLI:

Q. Could you describe this plastic bag?

A. I believe it was like an opaque, like a white where you can see through.

THE COURT: You could or could not?

THE WITNESS: I'm sorry, Your Honor?

THE COURT: You could see through the bag or you could not?

THE WITNESS: It was like an opaque. You know, you could tell there's items inside.

THE COURT: But you couldn't see what they were?

THE WITNESS: I couldn't see exactly what they were, no, sir.

THE COURT: All right.

THE WITNESS: At this time, the two hispanic males, Ramos and Lajara, got into the Toyota, went east on Auburn and south on 9th Street. I radioed backup officers, gave them the information, description of the car and the males along with the tag number. And this is over radio. I was informed over radio that they had picked them up. There was other backup officers. I informed, gave a description of Santiago and Labaron. They came directly on to Auburn Street. The apprehensions were made of Labaron and Santiago. A few minutes later, the blue Toyota was brought back and a wagon. These defendants were identified by myself in the 900 block of Auburn Street.

After Santiago and Labaron were arrested on Auburn Street, I directed Officer Scarpato to the blue



Lincoln parked on the south side of Auburn Street. I directed him to the trunk, informed him of what I had observed in the trunk from Melendez, the items Melendez had retrieved that were left in the car and what was placed in the car by Labaron, the item that he had received from Lajara. The trunk was opened and confiscated from the trunk, the right rear quarter panel where I had seen it placed, was retrieved was a plastic bag and it was, I was informed at that time that --

MR. GAY: Objection, Your Honor.

THE COURT: Sustained. You can tell us what you saw and observed but not what somebody else said.

THE WITNESS: I observed him bring out two plastic bags containing a white powder.

BY MR. MECOLI:

Q. I also want to back you up, Officer. The first time you saw Mr. Lajara bring a bag over to Mr. Labron, based on the area you were in and what you observed, what did you believe to be in that bag?

A. I believed it to be delivery of --

MR. GAY: Objection.

THE COURT: I'll overrule the objection and give it its proper weight. I don't know what they believed without a foundation has any weight.

BY MR. MECOLI:

Q. Now, Officer, you described this area before. How would you describe this area?

A. On the north side of Auburn Street, from 9th Street going west approximately half the block is, you know, a head-start program for preschoolers. Directly behind it is the rectory and the church of Saint Bonafice. There's approximately maybe eight houses, six or eight houses on the north side. At the end of the street, at Hutchinson, is the grade school for the church. I'm sorry. On the south side you have maybe another ten or twelve row homes.

Q. Now, how long did you observe this going on from when you started observing until the arrests were made?

A. From my first observations of Santiago and Labron, it was approximately two hours.

Q. And based on what you observed being handed out of the trunk and sold, what did you believe?

A. I'm sorry, counselor. I can't hear you.

Q. Based on what you observed being taken out of the trunk and being sold to individuals on the street in exchange for US currency, what did you believe was occurring?

A. I believed it to be illegal sales of cocaine.

Q. What do you base that on?

A. Ten years experience, the arrests that I've been involved in in that block, prior surveillances. I've walked through the area. I've observed previous transactions in that area. I've been involved with other officers that have made purchases in that block, identical items.



MR. CORRIGAN: Your Honor, I'd object to that and move to strike. He saw what he saw. This is merely bolstering his testimony.

THE COURT: Well, I think there's been a challenge to his ability to come to the conclusions he came to, so I think it's appropriate for him to set forth his experience and what he bases his conclusions on. So I'll overrule the objection.

BY MR. MECOLI:

Q. And, Officer, based on the, based on what you saw of the plastic bags taken out, what do you base your decision that they, your belief that they contained cocaine on?

A. At which point, counselor?

Q. At the point where you saw Lajara bring a bag to Labron.

A. Why I believed it? After the meeting that they had -- let me back up. Melendez gave Santiago the keys. These two males pulled up and talked to Santiago. Santiago at that time gave the keys to the other male. The trunk was opened. To me it indicated that they were going to be putting, you know, a package, cocaine, in there for further distribution. After Lajara went back to his Toyota and come back up and I saw the plastic baggie, I believed that it was a stash that they were going to put in the vehicle.

Q. What could you see when you looked at this plastic bag?

A. From my location? Are you talking about from Lajara?

Q. Yes.

A. Lajara, I could see that it was like an opaque plastic bag. It was rolled up. And it was placed in the exact area --

MR. GAY: Judge, I'm having extreme difficulty understanding this witness.

THE COURT: Hearing him, you mean.

MR. GAY: No, understanding him. His voice is loud enough but he, his mouth apparently is at such an approximation --

THE COURT: Actually, there's a dead spot right where you are sitting in this courtroom between the witness. Officer, pull the microphone a little closer and just keep your voice up a little but louder.

THE WITNESS: Yes, sir.

THE COURT: Now, let me just get back to the question. The question is --

MR. GAY: I've been sitting here in a dead spot all the time?

THE COURT: I thought you could hear.

MR. SAGOT: We selected that position for him, Your Honor.



THE COURT: I thought you could hear. In fact, you spent quite a bit of time in this courtroom, Mr. Gay. You know the acoustics better than me.

MR. GAY: No. Apparently not, Judge.

THE COURT: In any event, I think the question was as to what you were able to observe about the plastic bag that you testified was given by Mr. Lajara to Mr. Labron. Now, could you tell us again what you were able to see about that bag?

THE WITNESS: I could see that it was not a firm object.

THE COURT: Not what?

THE WITNESS: It was not a firm object. I mean, you know, to me the bag had the consistency that, you know, when you're confiscating cocaine from the street --

MR. SAGOT: Objection.

MR. GAY: Objection.

THE COURT: Well, overruled. I think he can testify as to the nature of the bag. Go ahead.

THE WITNESS: When I confiscated cocaine from the street, you got the consistency of the bag when you hold it. You could see if it's limp, if it's hard, if it's stuffed. This wasn't stuffed and it was laid out to where, to me, to me it had powder in it.

THE COURT: It was not a hard. You didn't believe it was a hard object from what you were able to observe.

THE WITNESS: No, sir.

THE COURT: Or a firm object.

BY MR. MECOLI:

Q. Officer, in your years at Narcotics, have you ever seen items packaged like this before?

A. Yes, sir. You know, in over ten years, I don't have a number, you know.

Q. Could you tell us what you've seen packaged like this?

THE COURT: Well, counsel, I don't understand your question at all. Are you talking about the bag that he couldn't see through or are you talking about the packets that he saw delivered, the baggies that he saw, or what are you talking about?

MR. MECOLI: Your Honor, I'm talking about the bag, the large bag that he's describing that Lajara passed to Labron.

MR. CORRIGAN: Your Honor, I'd object to that. It's an opaque bag. The officer has already said that he couldn't see through it. What did it look like? It's a ridiculous question, Judge, but I withdraw my objection.

THE COURT: The question is, have you seen narcotics packaged like that before? Have you?



THE WITNESS: Yes, sir.

MR. MECOLI: You Honor. I have nothing further of this officer.

THE COURT: All right. Who's going to lead off? Mr. Sagot?

MR SAGOT: May I, Your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. SAGOT:

Q. Officer Nimmo, is it, or Nimmo?

A. Nimmo.

Q. Officer, at what distance did you observe this opaque bag?

A. It was less than fifty feet.

Q. Less than fifty feet. With the aid of binoculars?

A. No, sir.

Q. Okay. Now, you described this bag as being opaque. And based on your experience as a narcotics officer, because the bag was not firm, you believe it to be some sort of controlled substance. Is that your testimony.

A. My testimony is along with what I observed prior to it, in the actions and reactions of the defendants, I believe it, yes, sir.

Q. Well, you never saw -- strike that. This bag itself, if the bag had let's say salt in it, how would it differ in texture and feel?

A. I've never confiscated salt.

Q. I didn't ask you what you confiscated, Officer. I said if it contained salt.

A. I don't know.

Q. How would it be different?

A. I don't know. I've never confiscated, handled salt. I buy salt in a box.

Q. I see. And if it had flour in it, Officer, how would it differ then?

A. If the flour is loose, it would probably be consistent with it. I don't know, counselor.

Q. You don't know.

A. I don't mess with flour.

Q. You don't mess with flour.

MR. SAGOT: Your Honor, I really think the officer is being evasive in his answers. If you'd direct him to answer the questions, I'd appreciate that.



THE COURT: Well, I think the point is, the testimony was that the bag was not firm. You couldn't see through it. He couldn't see what was in it. I heard that. I'm not sure how much further we can go on that point.

MR. SAGOT: Thank you, Your Honor.

BY MR. SAGOT:

Q. Now, this multitude of what you thought were drug transactions occurring, did you see them from the same distance that you observed this bag from the trunk?

A. No, sir. The defendants would be walking up and down the street. The most they were from me would be seventy-five feet, at the most.

Q. And the closest was fifty feet.

A. No, sir.

Q. Closer than that.

A. Yes, sir.

Q. But the furthest is seventy-five feet.

A. That would be maximum.

Q. Now, do you recall testifying at a preliminary hearing at front and Westmoreland Streets back on or about September twelfth of 1990?

A. I remember I testified. I don't remember what date.

Q. You remember you testified. All right. Page fourteen. And the following questions were asked of you, page fourteen: How far from the two individuals were you when you made the observations?

The witness, meaning you.

A. Yes, sir.

Q. The first time I saw them?

The Court: Yes.

The witness: First time I saw them, less than a hundred and fifty feet.

A. Yes, sir.

Q. Okay. So is it closer to a hundred and fifty feet or closer to fifty feet which you suggested today?

A. The first time I saw them?

Q. Yeah.

A. I would say the first time I saw them would be in that area, within a hundred and fifty feet. The first time I would see them is when they first come into the block.

Q. So your suggesting that seventy-five feet would be the furthest that they were ever from you would be inaccurate, then.

A. No, sir. When they were doing the transactions --

Q. So the transactions were being done at about seventy-five feet.



A. At most.

Q. And how many transactions are you suggesting occurred?

THE COURT: When we're talking about transactions --

MR. SAGOT: The original transactions with the people coming up and buying drugs.

THE COURT; You're talking about retail purchase transactions?

MR. SAGOT: Yes, sir, as opposed to wholesale. Yes, sir.

BY MR. SAGOT:

Q. At that time, they were occurring at about seventy-five feet; is that right?

A. No, sir. That was the maximum. Most of them were well within that.

Q. So that was within about a hundred and fifty feet. That was at about a hundred and fifty feet?

A. No, sir. The first time I saw them, the maximum distance would be a hundred and fifty feet, when I first got on location.

Q. Okay. Now, as His Honor suggested, the retail transactions which you say that you believed were occurring, at what distance were these observed?

A. They were, I would say, within twenty feet to a maximum of fifty to seventy-five.

Q. How many of these sales are you suggesting occurred during this two-hour period prior to the arrest of these defendants?

A. It was approximately close to a hundred.

A. A hundred. And you had a radio with you at that time?

A. Yes, sir.

Q. Were any of these retail purchasers arrested during the course of this surveillance?

A. Counselor, are you talking about packets being distributed or persons coming up?

THE COURT: The little packets.

THE WITNESS: Just the packets being distributed?

BY MR. SAGOT:

Q. These hundred or so sales that you're talking about.

A. It was at least a hundred or so packets.

Q. Were any of the buyers of these packets arrested?

A. No, sir.

Q. You had backup available to you at that time?



A. Yes, sir.

Q. Did you ask any of your backup to arrest any of these buyers?

A. No, sir.

Q. Was there anyone observing what you suggest are these hundred transactions other than yourself?

A. No, sir.

Q. You were the sole surveillance at that point.

A. Correct.

Q. Now, --

A. Counselor, on other locations, as different males would leave the area, the people may have been seen but not the subjects that I was looking at.

Q. I'm talking about for that immediate area that you were surveilling.

A. No, sir. I was the only one there.

Q. you were surveilling an area, not necessarily subjects; is that correct?

A. Auburn Street and a location.

MR. SAGOT: Okay. Now, would you indulge me just for one second, Your Honor?

THE COURT: Yes.

BY MR. SAGOT:

Q. Now, of these five or six previous, five arrests that you say that you participated in during the previous six weeks, these were arrests where you either participated in or were in fact the arresting officer?

A. I did a surveillance previous where I was the arresting officer or I was the processing officer involved in it.

Q. Of all the defendants arrested in that time frame, my client was not one of them; is that correct?

A. No, sir. I don't believe so.

Q. Okay. Now, this hundred or so drug transactions that occurred, they occurred in your testimony between whoever was passing by and purchasing narcotics and Mr. Santiago and Mr. Labron or Labaron, as you referred to him; is that correct?

A. Labron as the male?

Q. Yeah.

A. Yes, sir.

MR. SAGOT: Thank you. No further questions of this officer.

THE COURT: Who would be next? Mr. Gay, do you wish to go, or Mr. Corrigan?

MR GAY: Yeah. May I please, Your Honor?

THE COURT: Sure.



BY MR. GAY:

Q. Officer, between 9th and 10th Streets on Auburn, is there a smaller street that goes north and south?

A. There is Hutchinson Street there, sir.

Q. And where between 9th and 10th Street does Hutchinson Street fall in terms of a fraction of the distance between the two numbered streets?

A. It's 9th Street. Then it's Hutchinson.

Q. Is Hutchinson approximately equidistant from 9th Street and 10th Street or is it closer to one or the other?

A. There's no 10th Street at the corner. I'm not even sure right there, counselor. Because at Cambria, there's the cemetery there and there is no 10th. I'm not sure if 10th Street comes in down there or not. I'm not positive.

Q. Then how far is Hutchinson Street from 9th Street?

A. Hutchinson is, it's a very small block. Auburn is a very small block.

Q. Now, is the distance between 9th Street and Hutchinson Street taken up with the head-start program that you've told us about?

A. You lost me, counselor.

Q. Is the distance between 9th Street and Hutchinson Street taken up with the head-start program that you talked about?

A. If I recall, at the corner of 9th and Hutchinson on the north side, it would be the northwest corner, is the building, the church building.

THE COURT: The church building is at the corner of what?

THE WITNESS: 9th and Auburn.

BY MR. GAY:

Q. That's on the northwest corner.

A. Northwest. It goes from Cambria to Auburn street on 9th. And it goes back. I'd say close to a third of the block down.

Q. Okay. Where within that block was the Lincoln that you told us about?

A. Directly across from the head-start program on, it would be on the south side.

Q. And how many feet would that be from 9th Street as you observed it at the time?

A. From 9th Street? From here, at most from here to the corner, or to the water cooler, at most.

THE COURT: To the water cooler.

THE WITNESS: Yes.

THE COURT: From 9th?



THE WITNESS: Where the Lincoln would be parked, the most it would be would be from here to the corner, or to the cooler.

THE COURT: Well, from where you are to the cooler is about sixty feet.

MR. GAY: Sixty feet.

BY MR. GAY:

Q. Now, as you were watching that car, were you looking at the front of the car or the back of the car or were you looking at one of its sides?

A. I had access to the side and the rear.

Q. Which side? Driver or passenger?

A. The driver's side of the automobile.

Q. So you were someplace then on the north side of Auburn Street at the time, were you not?

THE COURT: Well, let's clarify one thing. Which way was the Lincoln facing when it was parked?

THE WITNESS: The Lincoln was facing toward 9th Street, which would be east.

THE COURT: Okay. so can you restate your question again, Mr. Gay?

BY MR. GAY:

Q. You were positioned somewhere on the north side of 9th Street while you were making your observations, were you not?

A. No, sir.

Q. Were you in a van or some other location?

A. I was in another location, yes, sir.

Q. Were you in some location that's secret, that needs to be protected at this time for some reason?

A. I believe so, yes, sir.

MR. GAY: Well, may we have an in camera determination, Your Honor, as to whether or not there is a need to keep that location secret?

THE COURT: Let me ask a few generic questions and maybe that will save the in camera.

BY THE COURT:

Q. Officer, was the location that you were in a location that required someone else's permission to use?

A. Yes, sir.

Q. All right. And by that I mean, I don't mean a government official. I mean a citizen of some sort.

A. No government official.

Q. All right. Do you have any personal knowledge of whether, well, when was the last time you went back to that block from today, the most recent time?



A. Probably October of that year.

Q. Of that year.

A. Yes, sir.

Q. You haven't been back since.

A. I haven't, no, sir.

THE COURT: Are there any other generic questions you'd like to ask in this regard, Mr. Gay?

MR. GAY: Yes.

BY MR. GAY:

Q. Do you have any reason to believe that the person who granted you permission to use the location that you were in --

A. Counselor, I can't hear you.

Q. There's a dead spot.

A. No. It's the train.

Q. Do you have any reason to believe that the person who granted you permission to use that location lives there any longer?

A. I'm not positive that person lives there now or not.

Q. The fact is, you're not only not positive but you have no reason to know that that person continues to live at that location, do you?

A. Do I have a reason to know?

Q. Do you know whether the person lives there or not now?

A. I am not positive that that person lives there now.

Q. Of course you're not positive. But the fact is, you also just do not know; is that right? Yes or no.

A. I do not know.

MR. GAY: If Your Honor please, I don't know that the Commonwealth can establish at this point that there's a further need for secrecy or to protect anyone if the individual is no longer there.

THE COURT: Counsel, do you have a comment on that?

MR. MECOLI: Your Honor, I would ask to hear the officer perhaps in camera and make that determination yourself.

THE COURT: Well, I don't know what else he can tell us at this point. I mean, he's told us that he needed someone's consent. He's told us that he doesn't know.

Let me ask you this. Do you have any reason to know if that person doesn't live there any more?

THE WITNESS: Your Honor, I'm not necessarily concerned about that person. If I could tell you what the situation is.



THE COURT: Well, let's put it this way. I don't particularly want to hear any information about, well, I don't want to hear any information about this defendant, these defendants.

THE WITNESS: No, sir. It has nothing to do with the defendants.

THE COURT: Then why don't you tell me why it is that you believe that the confidentiality of this location should be preserved?

THE WITNESS: Why?

THE COURT: Yeah.

THE WITNESS: The location could possibly be used again and for the safety of the location, I felt.

THE COURT: For the safety of what?

THE WITNESS: Of the location.

THE COURT: By that you mean what?

THE WITNESS: The structure.

THE COURT: You mean someone would do something do it.

THE WITNESS: Yeah.

MR. CORRIGAN: Your Honor, I'd have to join in with Mr. Gay's.

THE COURT: Okay. I just have a couple of other questions.

Did I understand you to say that between 9th Street and Hutchinson Street, in addition to the head-start program, on the north side of Auburn Street are also some houses?

THE WITNESS: On the north side of Auburn Street, there's, I would say at most eight houses, I believe.

THE COURT: Between 9th and Hutchinson; is that right?

THE WITNESS: Yes, sir.

THE COURT: Now, and there's houses on the south side of Auburn Street; is that right?

THE WITNESS: Yes.

THE COURT: Between 9th and Hutchinson.

THE WITNESS: Yes, sir.

THE COURT: Were you able to observe any abandoned or unoccupied houses on the north or south sides of that block back when you made these observations?

THE WITNESS: Did I observe any?

THE COURT: I mean, some blocks you go on, there are houses that are abandoned.

THE WITNESS: There is several. I believe there is several on the north side. I believe there's, at the time I believe there was one on the south side. There was one.



THE COURT: So that the rest of the houses so far as you knew were occupied; is that correct?

THE WITNESS: Yes, sir.

THE COURT: Can you tell us whether the location that you used on this date to make these observations was an occupied location on that date?

THE WITNESS: On that date, there was other people in the structure.

THE COURT: Occupied.

THE WITNESS: Yes, sir.

MR. SAGOT: Your Honor, for clarification. Could you inquire as to whether or not these people were residents of that structure?

MR. MECOLI: Your Honor, I object to that.

THE COURT: Well, let me put it this way. Were the people who occupied that residence the same people whose permission you needed to obtain or was it, were they different?

THE WITNESS: One of them was, yes, sir.

THE COURT: All right. Well, what I'm going to do is this. I am going to rule that I'm not going to require the officer to give the precise location of his observation point in view of the fact that he needed to obtain the cooperation of someone to make those observations and in view of the general level of violence that even the courts have taken notice of that attends drug activity.

However, I think there are certain questions that can be asked to give the defense an adequate opportunity to determine what the ability of the officer was to observe short of revealing that location.

Now, officer, I'm going to ask you some of those. Were you making your observations at street level or at some different level?

THE WITNESS: I was at different levels, Your Honor.

THE COURT: Different levels at different times?

THE WITNESS: On this date, it was basically on one level.

THE COURT: Was that level street level or some other level.

THE WITNESS: That was some other level.

THE COURT: All right. Are the structures on the, the structures on, the houses let's say on the north and south side of Auburn Street between 9th and Hutchinson, are they all basically the same height?

THE WITNESS: I believe they are except for the end buildings.

THE COURT: How many levels above the street were you?

THE WITNESS: I was, I would be on the second floor.



THE COURT: Was there anything between you and the, your line of observation? Were there any objects between you? Was there a window? Was there shutters? Were there trees?

THE WITNESS: There were windows that were open. I don't believe there was any trees on that street.

THE COURT: What I will do at this point is I'll permit counsel to ask certain questions and I'll just rule on the individual questions.

MR. GAY: Thank you.

BY MR. GAY:

Q. Were you in your same point of observation at the time that you first observed the two individuals come into the block, as you have described it?

THE COURT: Are you talking about in the Toyota?

MR. GAY: No, sir. I beg your pardon. Labron and Santiago.

THE WITNESS: Was I at the same location when I observed them?

MR. GAY: Yes, sir.

THE WITNESS: Yes, sir.

BY MR. GAY:

Q. And at that time when you first observed them, they were about a hundred and fifty feet away from you; is that right?

A. That would be the maximum it would be.

Q. And that's when you were where you were and they rounded the corner of 9th Street to come into that block; is that correct?

A. No. I didn't say that, counselor.

Q. Well, where were they when you first saw them?

A. They were in the 900 block of Auburn Street.

Q. Where were they when you first observed them at that distance of a hundred and fifty feet?

A. When I first observed them, they were I guess it would be halfway between Hutchinson and 9th Street when I first observed them.

Q. And at that point they were a hundred and fifty feet away from you.

A. That's my guesstimate. That would be the maximum, yes, sir.

Q. Okay. Now, the Lincoln that you have described for us was about sixty feet from 9th Street as it was parked on the south side, was it not?

A. Yes, sir. If I could. It would be maybe, the Lincoln would be maybe three car lengths from the corner, you know, if that would be a better help.



Q. So at the time that you first observed Santiago and Labron, they were then or the Lincoln was then between them and 9th Street, was it not?

A. When I first observed Santiago and Labron, the Lincoln was between them.

Q. The Lincoln was between Santiago and Labron and 9th Street.

A. No, sir. The first time I observed them, I took notice of them, they would be, it would be west of. If you want to use the Lincoln as a point, they would be west of the Lincoln.

Q. By how far?

A. From my point to --

Q. Yes.

THE COURT: No. How far west of the Lincoln?

THE WITNESS: West of the Lincoln? Again, the maximum would be at that point, I believe the maximum would be a hundred fifty feet.

BY MR. GAY:

Q. So they were a hundred fifty feet west of the Lincoln at the time that you first observed them, approximately.

A. That would be the most, counselor.

Q. And since, and they were approximately a hundred and fifty feet east of you at that time also; is that correct?

A. When we're talking distances, you're talking from me to them?

Q. Yes.

A. Correct? Yes, sir.

Q. Okay. So at the time that you observed the Lincoln, it was about one hundred and fifty feet plus ninety feet away from you, was it not?

A. The Lincoln was, within thirty feet of me.

Q. Well, wasn't the Lincoln, as you say, three car lengths from the corner?

A. Yes, sir.

Q. Of 9th Street, right?

A. Yes, sir.

Q. And when you observed Santiago and Labron, they were west of the Lincoln and a hundred and fifty feet east of you.

THE COURT: East or west?

MR. GAY: East is what his testimony was.

THE WITNESS: You're talking about Santiago.



MR. GAY: And Labron when they first came into the block.

THE WITNESS: You said they turned around the corner from 9th Street. I never said that. I didn't see them at that point.

BY MR. GAY:

Q. We're past that point. You corrected us about that.

A. I saw them in the middle of Auburn Street, middle of the block.

Q. So they were in the middle of the block of Auburn Street between 9th and Hutchinson; is that right?

A. Correct. Yes, sir.

Q. And at that time, they were a hundred and fifty feet east of you.

A. Maximum. No. That would be west of me.

Q. West of you?

A. That would be west of me, yes, sir. If they went east, they'd be past 9th Street.

Q. Well, were you in the 900 block of Auburn Street at the time that you were making your observations?

A. Yes, sir.

Q. Well, as you were looking toward 9th Street at that time, then you were looking east, were you not?

A. If I looked at 9th Street, I'm looking east. If I look at Hutchinson Street, I'm looking west.

Q. Okay. But you were looking toward 9th Street at the time that you first observed Labron and Santiago come onto the block, were you not?

A. The first time I observed them?

Q. Yes, sir.

A. I saw they were west of me.

Q. They were west of you.

A. West of me, yes, sir.

Q. And they were a hundred fifty feet west of you at that time.

A. Yes, sir.

Q. Now, from that same location as you viewed the Lincoln, how far was it from you?

A. Within thirty feet.

Q. So it was almost directly across the street, was it not?

A. It was within thirty feet of me, yes.

Q. How long did you remain in that location before the blue Toyota came into the block?

A. From about 12:15 to, it was approximately two hours, I guess.



Q. And when it came into the block, did it park in front of the Lincoln or behind it?

A. I believe it was in front of the Lincoln.

Q. Well, is there anything that you can think of now that would prevent your remembering whether it was in front of the Lincoln or behind the Lincoln?

MR. MECOLI: Objection.

THE COURT: Overruled.

THE WITNESS: Answer it?

THE COURT: Yeah.

THE WITNESS: Thinking back where the Lincoln was and for me to get the tag number of the vehicle, I believe it would have to be in front of the Lincoln.

BY MR. GAY:

Q. But you don't have a clear recollection of that at this time.

A. Like I said, I believe it is. I remember him coming back to the Lincoln.

Q. You have reconstructed the location of the Toyota by believing that you would not have been able to write down the tag had the Toyota not been parked in front of the Lincoln rather than behind it; is that right?

A. No, sir. What I recall is the male getting out of the car and walking back to the Lincoln. That's what I recall. I recall writing down the tag.

Q. Okay. You recall that specifically, do you not?

A. Writing the tag down?

Q. Right.

A. Yes, sir.

Q. And you recall the males getting out of the car and walking back toward the front of the Lincoln from the Toyota; is that right?

A. I recall, I believe that is, yes, sir.

Q. Well, look back into the recesses of your memory as well as you have to at this time and be as careful as you can as to whether that was the case or not.

MR. MECOLI: Objection, Your Honor.

THE COURT: Overruled. I guess the real question is how sure are you, is that recollection? How clear is that recollection?

THE WITNESS: The recollection that I have, like I said, is that the male went from the Toyota to the Lincoln and placed the objects in the trunk and I recall writing the tag down.

BY MR. GAY:



Q. You do remember testifying at the preliminary hearing in this case on September the twelfth, 1990, at page seven, do you not?

A. I remember testifying, yes, sir, in this case.

Q. Do you remember on that date being asked the following question and giving the following answer?

Answer: On that date and time, I was conducting a surveillance in the 900 block. Skipping an entire page six, going to the top of the page seven. Approximately 2:18, a blue Toyota pulled up in the 900 block of Auburn, parked behind the blue Lincoln.

Do you remember giving that answer on that date?

A. I don't remember the exact. I remember testifying, counsel.

MR. GAY: May I approach the witness, please, Your Honor?

THE COURT: Let me just ask you this. I assume there's no dispute as to the accuracy of the transcript, is there?

MR. MECOLI: No, Your Honor.

THE COURT: I mean if you read it in and there's no dispute.

MR. GAY: It's important, Judge, if I can, to refresh the recollection of this witness.

THE COURT: Go ahead.

THE WITNESS: Yes, sir.

BY MR. GAY:

Q. Would you please, Officer, examine the contents of the transcript of that preliminary hearing between page five and to the top of page seven and tell whether that refreshes your recollection or not?

A. Just the top of seven.

Q. Yeah.

THE COURT: I didn't hear what you said, Officer.

THE WITNESS: No. I asked him just to the top of page seven.

THE COURT: Yes.

THE WITNESS: Where you have it circled?

MR. GAY: Yes.

THE WITNESS: Yes, sir. That's as far as I read.

BY MR. GAY:

Q. Now, is your recollection refreshed at this time, Officer, that the blue Toyota was parked behind the blue Lincoln rather than ahead of it?

MR. MECOLI: Objection, Your Honor. I believe it's been asked and answered.



THE COURT: Overruled. You can answer it.

THE WITNESS: My recollection is what I testified to today. If I testified then, testified then, I would go with that testimony. I would believe that testimony.

BY MR. GAY:

Q. So your recollection still is that the blue Toyota was parked ahead of the Lincoln.

A. That's what I recall. If I was to recall the testimony, that would be fresher in my mind at that point.

Q. Which would be fresher in your mind?

A. What I testified there, sir.

Q. Oh, okay. So what you're saying is that the --

A. I may be wrong on the location in what I'm saying today.

Q. What you're saying is that it is more likely that the testimony that you gave at the preliminary hearing with respect to the location of the Toyota and the Lincoln was more accurate then than your testimony is now.

MR. MECOLI: Objection.

THE WITNESS: It may be, yes, sir.

BY MR. GAY:

Q. Well, if that is indeed the case --

THE COURT: Mr. Gay, could I ask you this? I was actually enjoying this so much that I didn't notice the clock. I see it's 1:15. Why don't we take a break now until 2:15 and then we'll finish up.

MR. SAGOT: Your Honor, before we take a break, would you indulge me for one moment, Your Honor?

THE COURT: Yes.

MR. SAGOT: With Your Honor's permission, if we could. I don't think cross-examination of this officer is going to be much longer. May we please finish this cross-examination prior to the luncheon break?

THE COURT: Is there some reason?

MR. SAGOT: Yeah. We'd like to get him all done now and then we don't have to reconstruct anything later. It will probably take more of the Court's time to figure out where we were when we left on cross than to finish it up.

THE COURT: I'm going to break now because I have some specific things to do at this time.

MR. GAY: Your Honor, given that we're breaking in the middle of this officer's cross-examination, would you please instruct him not to discuss this matter with anyone nor at this point to use any documents to refresh his recollection?

THE COURT: I think that's a fair instruction. Any problems with that, Officer?



THE WITNESS: I have notes written down, Your Honor, property receipts and stuff like that.

THE COURT: Pardon me?

THE WITNESS: I have notes on property receipts.

THE COURT: There's notes he can certainly look at. That's not a problem. But other than that, you're not to discuss this case.

THE WITNESS: No.

MR. GAY: As long as the notes are identified at this time so that we can use them for the purpose of cross-examination and be able to --

THE COURT: Is that just what you have there?

THE WITNESS: Just this.

THE COURT: Just the card. Is that what you're referring to?

THE WITNESS: Yes, sir.

THE COURT: He can keep that. I'm satisfied.

MR. GAY: May we know, Judge, whether that was something that was prepared today for the purpose or recently for the purpose of testimony or whether or not it's something that was prepared contemporaneously?

THE COURT: I couldn't hear what you said because you talked while Mr. Gay was talking.

MR. MECOLI: That's all right, Your Honor.

THE COURT: When did you prepare it, Officer?

THE WITNESS: Tag numbers, property receipt numbers.

THE COURT: No. I say when did you prepare it. Today?

THE WITNESS: I think it was, I had it yesterday. I think yesterday, I believe.

THE COURT: Yesterday.

MR. GAY: Judge, that's not something that he could properly use to refresh his recollection.

THE COURT: Well, if he's going to use it, then I think that the District Attorney has an obligation to lay a foundation if he chooses to use it. But I don't think that there's anything that prevents a man from using his own notes, not on the witness stand, though.

MR. GAY: May we just have that marked as an exhibit and left with the stenographer during the recess?

THE COURT: Sure. We'll just mark it as C-1.

COURT CRIER: C-1, Your Honor.

THE COURT: Well, C-1, yeah.

MR. GAY: D-1.

COURT CRIER: They're saying D-1.



THE COURT: C-1 it's going to be.

MR. SAGOT: And he will not be permitted to have access to the 49 or anything like that.

THE COURT: No. He's not going to look at anything over lunch.

COURT CRIER: The Court will take a recess until 2:15.

(A luncheon recess was taken.)

THE COURT: Let's have Officer Nimmo come back up on the stand. All right. Mr. Gay, please proceed.

COURT CRIER: Judge, where is our interpreter?

MR. GAY: Yeah. We do need the interpreter.

THE COURT: Oh, for God's sake. They knew that they were supposed to be here at 2:15. Let's give them a call. Tell them we're all sitting here at the bar of the court waiting for them.

COURT CRIER: They're both on their way, Judge.

(A brief recess was taken.)

THE COURT: All right. We can start with one. Where is Iris, do you know?

COURT CRIER: She's on the way also.

MR. GAY: Your Honor, we'll need to distribute the interpreter so that he can translate.

THE COURT: Why don't you just talk real loud until Iris gets here. He can move over. All right. Mr. Gay?

MR. GAY: Yes, sir.

BY MR. GAY:

Q. Officer, you do remember testifying at that preliminary hearing at Front Street and Westmoreland on September the twelfth, 1990, as you've said before, do you not?

A. I remember testifying on the case.

Q. Do you remember on that date, the date being September the twelfth, 1990, being asked the following questions and giving the following answers?

Question: Where were the two males in relation to the Lincoln when you first saw them?

Answer: Which two?

Question: Mr. Santiago and Mr. Labron.

Answer: Yes.

When I first observed them, they were at 9th and Auburn.

THE COURT: 9th and?

MR. GAY: Auburn.



BY MR. GAY:

Q. Do you remember those questions and answers?

A. I don't, no, sir. I remember testifying. I don't remember that.

Q. May I show you the notes of testimony?

A. Yeah.

MR. GAY: If I can please do so, Your Honor.

THE COURT: Yes.

MR. GAY: Please start at the bottom of page fifteen, Officer, and read through and including the highlighted sentence, the first one you reach, top of page sixteen.

THE WITNESS: Out loud or to myself.

MR. GAY: To yourself, for the purpose of refreshing your recollection, if you can.

BY MR. GAY:

Q. Have you done that?

A. Down to here, right?

Q. Yes. Have you done that?

A. Yes, sir.

Q. Having read those notes of testimony from that preliminary hearing, Officer, is your recollection

refreshed as to the location where you first observed Mr. Santiago and Mr. Labron?

MR. MECOLI: Your Honor, I have an objection at this point. What he's doing is impeaching the witness, not refreshing his recollection. The officer hasn't stated he doesn't recall anything at all. He's not really refreshing his recollection at all.

THE COURT: I'm going to overrule the objection. You can answer it, Officer.

THE WITNESS: I'm sorry. Could you give me the question again, counsel?

BY MR. GAY:

Q. Having read the notes of testimony from that hearing with respect to the portions that your attention was drawn to, is your recollection refreshed as to where you observed Mr. Labron and Mr. Santiago the first time that day?

A. I recall seeing them in the middle of the block. Now, if they're referring in that testimony to is that the first time I saw them make a transaction, I don't recall, or if that was what I was referring to.

Q. Well, the question was where were the two males in relation to the Lincoln when you first saw them.

A. Well, what I recall is seeing them in the middle of the block.

Q. Okay.

A. Initially.



Q. The middle of the block was where with respect to you?

A. That would be west of me.

Q. And how far west?

A. Middle of the block.

Q. No. How many feet west of you were they then when you first saw them?

A. Again, it would be within a hundred and fifty feet, less.

Q. I beg your pardon?

A. It would be less than a hundred and fifty feet.

Q. Okay. Going further, following your answer, which was when I first observed them they were at 9th and Auburn. They were in front of it, thirty or forty feet.

Question: So I take it the two men were walking toward you; is that correct?

Answer: When I first saw them, standing on the corner.

Do you remember that question and answer?

A. I don't remember the question, no, sir.

Q. I beg your pardon?

A. I don't recall the question.

Q. Do you remember the answer, that they were standing on the corner when you first saw them?

A. During the course of the surveillance they were standing on the corner. They were standing in front and beside the vehicles. They were standing different locations.

Q. Do you remember your answer, when I first saw them, standing on the corner? Yes or no.

A. I do not recall.

Q. You don't remember testifying that way.

A. I remember testifying. I don't remember the individual questions and the individual answers, no, sir.

THE COURT: I have to step off the bench for one moment.

(A brief recess was taken.)



THE COURT: My apologies, Mr. Gay. Please proceed.

MR. GAY: Not at all, Judge. If Your Honor please, in view of the questions that were asked of this officer, I ask at this time that the Commonwealth produce the evidence being the plastic bags in question, as they will be needed for the purpose of examination. Incidentally, I requested the District Attorney to order that a short while ago to save the Court some time.

THE COURT: Do you mean today?

MR. GAY: Yes. Perhaps he has.

THE COURT: Well, can you tell me where the items are?

MR. MECOLI: Well, counsel is incorrect in assuming that we can go upstairs and get them. They would be kept at the chemist lab, Your Honor. They wouldn't be kept upstairs.

THE COURT: Well, I assume what you're particularly interested in is the bags themselves.

MR. GAY: The bags.

THE COURT: When you say the bag, the opaque bag that has been testified to?

MR. GAY: Well, that's it, yes.

THE COURT: Yeah. Well, let me just ask you this question. Is that opaque bag listed on the property receipt?

MR. GAY: It is listed on the property receipt, Your Honor. Let me just say, let me just say, is the property receipt in question 291304, the one with respect to the bag?

MR. MECOLI: I believe so.

MR. GAY: Yes. Well, that property receipt, Your Honor, itemizes three plastic bags all of which are described as clear.

THE COURT: It doesn't list an opaque bag.

MR. GAY: It does not.

MR. SAGOT: It does not, nor does it list it on any of the remaining property receipts that have been supplied to us.

THE COURT: The only thing is this. You know, we can certainly get the physical evidence up here but from the listing that you've described to me, that is not going to include an opaque bag.

MR. GAY: Well, that's correct, sir.

THE COURT: So I'm not quite sure what I would have to bring up if that's the point to be made. I mean, if there's no, I mean, from what's been presented to me, if the testimony is going to be that these are the property receipts that are prepared, you know, then I don't think they're going to bring anything like that up. Now, maybe what we can do is when we take a break, you can call down to the Chem Lab, have them take it out and have them tell you whether in fact there's anything there.



MR. MECOLI: Your Honor, I don't think that's going to satisfy counsel.

MR. SAGOT: I think what the issue is, Your Honor --

THE COURT: Wait. One at a time, please.

MR. MECOLI: May I finish? I have no objection to them bringing it, Your Honor, but understand that an officer is going to have to go down and get it. I myself can't do it. No one else can do it.

THE COURT: The chemist can bring it up.

MR. MECOLI: No, they can't, Your Honor. They're under a directive not to.

THE COURT: All right. The whole point is if the effort is to ascertain whether there was a bag that was supplied to the Chem Lab when the officer turned them in, if the chemist says that there isn't, would that end the inquiry, Mr. Gay?

MR. GAY: I don't have any problem with that. Contrary to what counsel says, I can speak for myself and if the Court makes a reasonable suggestion, I can accept it.

MR. SAGOT: Judge, I just think that, I have no requirement that the evidence be here provided the District Attorney will not argue to Your Honor anything contra to the property receipt.

MR. MECOLI: Your Honor, I'd like to have my case presented my way. If they'd like to have the evidence presented, we'll present the evidence.

THE COURT: That's a broad request. Do you have some other concern as to whether there's an opaque bag there?

MR. SAGOT: Judge, there's a genuine issue as to whether or not the bag is clear or the bag is opaque. The property receipt says clear, that there were three clear bags. If the District Attorney is going to suggest to Your Honor that this is inaccurate, then I think that Your Honor must see these bags.

THE COURT: The first thing I want to do is when we take the next break, before I decide this issue, we will have the DA call the Chem Lab and they'll pull the items out and tell you what's there.

MR. MECOLI: Very well, Your Honor.

THE COURT: Please proceed.

BY MR. GAY:

Q. Officer, when you say you saw Mr. Lajara reach into the back seat of the Toyota and take out the objects that you have described as being, one of which was an opaque plastic bag or were both of them opaque?

A. There was one bag that was taken out.

Q. Okay. There was not more than one?

A. There was one bag taken out.

Q. And what size was it as you observed it at the time that you say he took it out?



A. Maybe a foot, you know. It was folded and rolled up.

Q. Folded and rolled up.

A. Yes, sir.

Q. Well, I want you, if you would, please, to describe the dimensions of it as you observed them at the time that you say he took it out of the car, not what may have been at some later time when you came into possession of something, then unrolled it and did whatever you had to do.

A. When I saw, we're talking about the male in the white and gray long-sleeved shirt, right?

THE COURT: We're talking about the person who took the bag out of the Toyota.

THE WITNESS: He mentioned a name.

MR. GAY: Whoever that was.

THE WITNESS: Yes, sir. He took the bag out. It was approximately eight to twelve inches, maybe several inches round. It was folded. It appeared to be folded.

BY MR. GAY:

Q. Officer, do you remember again testifying at that same preliminary hearing and when asked to describe the size of the bag that you say you saw and when you were questioned as follows, what size were they?

Answer: Approximately maybe six inches, about an inch and a half, two inches or two inches by two inches.

Do you remember that question and answer?

A. Counselor, I don't remember any of the questions or the answers. I remember testifying at it, yeah.

Q. Okay. Well, let me just ask you this. Is your recollection of the incident in question more clear at the time of your testimony at that preliminary hearing or now?

A. I would say it would be more clear then.

Q. Well, is what you're saying then today that your testimony insofar as it is inconsistent with the preliminary hearing testimony is incorrect and that the preliminary hearing testimony is correct?

A. Well, what I'm testifying to is what I recall. What I recall is what I believe. Now, if I have a choice to pick between September of last year and now, you know, more than likely my mind would be more fresh at that point.

Q. Well, knowing that your testimony at the preliminary hearing was that the bag in question was about six inches by about an inch and your testimony here today was that it was about eight to twelve inches by some other dimensions, which of those versions of your observations with respect to the size of the bag do you choose?

MR. MECOLI: Objection, Your Honor.



THE COURT: Overruled.

THE WITNESS: What I recall is what I testified today. I don't remember the answer on that date.

MR. GAY: Objection, move to strike.

THE COURT: Well, I don't think it's responsive.

Are you saying, officer, that if I said to you which do you think is more accurate, your recollection today or your recollection back then when you testified at the preliminary hearing, which one of those would you choose?

THE WITNESS: I would choose September of last year.

BY MR. GAY:

Q. Now, at the time that you observed the person take that bag from the back seat of the car, that car was parked some distance in front of the Lincoln, was it not?

A. It was parked not -- it was in front of the Lincoln.

Q. I beg your pardon?

A. It was in front of the Lincoln, not far.

Q. How many feet separated the back of the Toyota from the front of the Lincoln?

A. There wasn't that much separation between them. It was five, ten feet.

Q. Now, when the individual reached into the back seat of the Toyota and took out the, what you've described as being an opaque bag, did he after doing so walk directly to the rear of the Lincoln?

A. Did the male walk directly to the rear of the Lincoln?

Q. Yes.

A. He walked on the side of the Lincoln, the passenger side, and gave it to Labaron, the male here, Labaron.

Q. So if I'm not wrong, or if I've understood you correctly, he took it out of the passenger side of the Toyota, walked along the south footway of Auburn Street?

A. I'm sorry. I'm sorry.

Q. Don't be sorry. Just tell us what happened.

MR. MECOLI: Your Honor, would counsel refrain from that?

THE COURT: It's harmless. He's being courteous to the officer.

Officer, what do you recall?

THE WITNESS: Mr. Ramos, the male with the beard, I believe he walked over at the time.

THE COURT: Walked over where?

THE WITNESS: Between the vehicles. And the package was given to Labaron at that point and placed



in the right rear quarter panel. The one male changed his location, I recall.

THE COURT: Go over that again from the time that somebody took something out of the Toyota. Who took something out of the Toyota?

THE WITNESS: Lajara, the gray and white long-sleeved shirt, took it out. He's going back to --

THE COURT: Took it from what side of the Toyota?

THE WITNESS: The passenger side rear.

THE COURT: Right.

THE WITNESS: Going back towards the Lincoln. The other male had walked, I believe, over to him, close to him. And then it was given to Labaron.

THE COURT: Well I assume that you're saying that Mr. Lajara took it out of the Toyota. What did he do with the package?

THE WITNESS: I believe he's the one that -- both of them were there. I believe he's the one that gave it to Labaron.

MR. GAY: Are you finished with your answer?

THE COURT: Yes.

THE WITNESS: I'm waiting.

BY MR. GAY:

Q. Now, over what distance was it that you say Mr. Lajara walked with that opaque bag before whoever it was that he gave it to took it?

A. Half the length of the Toyota, the separation between the vehicles, and I guess it would be the length of the Lincoln.

Q. So he had it then for a matter of maybe a second or two, didn't he?

A. I'm sorry?

Q. He had it in his hand for maybe a second or two, didn't he?

A. No. It was more than that, sir. He was in no rush.

Q. Three seconds?

A. Three, five seconds. I, you know.

Q. Okay. Some small amount of time.

A. A sufficient time for me to observe him, yes, sir.

Q. And when you made your observations of it, did you observe that the package was being held in his left or his right hand?

A. I had full view of it. I believe it was his right hand, it would be.

Q. Do you have a recollection at this time of which hand you say he held the package in?



A. Do I have a recollection of seeing the package? No, sir.

Q. You can't remember now whether it was in his left hand or his right hand.

A. I would believe it to be in his right hand.

Q. When you say you believe, I would like you if you possibly can, if you do recall the incident, to go back and see if you can picture in your mind at this time that event and see whether you can see which of his hands you say he held the packet in.

MR. MECOLI: Objection, asked and answered.

THE COURT: Overruled. I don't understand the level of the officer's recollection. I mean, do you have any degree of certainty of your recollection as to what hand it was in?

THE WITNESS: The only thing I would believe, it had to be in his right hand, Your Honor.

THE COURT: But you don't recall?

THE WITNESS: I don't recall specifically.

BY MR. GAY:

Q. Now, after Mr. Lajara, as you say, took the package and handed it off to someone else, what did Mr. Lajara then do?

A. What did who do?

Q. What did Mr. Lajara do after he then handed the package off to someone else?

A. I believe he went back to the car. He got in the car and he drove off. I was watching the Lincoln at this time. I know both males got in the car. They drove east on Auburn and south on 9th Street.

Q. Now, with respect to this opaque package that you saw, did you see whether within the Lincoln that package was placed by the person who placed it there?

A. Exactly, yes, sir.

Q. You did.

A. Yes, sir.

Q. And where was that?

A. It was in the right rear quarter panel of the trunk.

Q. And incidentally, you were certain that the packet that you saw was an opaque one, aren't you?

A. I believe so, yes, sir.

Q. Were you present at the time that that Lincoln was searched?

A. I observed the officers open the Lincoln, yes, sir.

Q. Were you there?

A. I wasn't at their location. I had stayed at my location.



Q. Well, you observed them open the trunk of the Lincoln; is that it?

A. You're fading, counsel.

Q. When you observed them open the trunk of the Lincoln, from your advantage point, were you able to see them go to the place where you say that packet was placed?

A. Before they opened the vehicle, I directed them to the vehicle. They opened the vehicle. Prior to them opening it, I directed them to the vehicle and exactly where in the trunk. It was opened. The officer, officers were around it. They opened it and retrieved it, informed me. I don't know if they knew I could see or not. But they informed me over radio that they recovered it and I was there.

Q. Did they go to the location that you said the packet was placed in?

A. Yes, sir.

Q. Yes. And after they went to that location, did they exit the trunk of the vehicle?

A. I'm talking about the location inside the vehicle.

Q. I am too.

A. Yes, sir.

Q. Go ahead.

A. They went directly to the vehicle. It was opened and they retrieved it from the right rear quarter panel.

Q. And how long were they in the trunk of that vehicle for that purpose?

A. They opened it and went right to it. I don't recall the trunk being closed afterwards, no.

Q. You don't.

A. No, sir.

Q. Well, --

A. They didn't open the trunk and close it right away.

Q. They left the trunk opened.

A. They could have. I don't recall.

Q. You don't remember whether it was opened or closed.

A. No, sir. They retrieved the items and that's all I recall.

Q. They retrieved the items that they got from the trunk; is that right?

A. They retrieved the one bag and I believe the baggie that Melendez had placed in there.

MR. CORRIGAN: Objection to what he believes.

THE COURT: Well, I'll sustain the objection.

BY MR. GAY:



Q. Did you see any of the officers who were retrieving whatever it was that was retrieved from the trunk of the Lincoln retrieve an opaque bag?

A. What was placed in there they retrieved, yes, sir.

Q. Listen to my question, please. Did you see any of the officers retrieve an opaque bag?

MR. MECOLI: Objection.

THE COURT: Overruled. I don't understand his answer yet.

THE WITNESS: They retrieved what I told them and it was the opaque bag.

THE COURT: Officer, it's very simple. When they came out of the trunk did you see them have an opaque bag in their hand? Do you recall whether you did or you didn't?

THE WITNESS: Yes, sir.

THE COURT: Okay.

THE WITNESS: They, you know.

BY MR. GAY:

Q. Did you see which of the officers retrieved that opaque bag?

A. I believe Officer Scarpato. He opened the trunk and retrieved the items.

Q. Did you ever see that opaque bag again?

A. I saw the items that were confiscated inside. I don't recall if I saw the bag again or not inside. The items were taken out and field tested and packaged for processing to the Chem Lab.

Q. Incidentally, what was your purpose in going to that surveillance point that day?

A. The information I had that cocaine was being sold at that location. I had further information that the one male received large quantities of cocaine. My intention was to try to take off what was being delivered.

Q. All right. So the one male was the male who left in the Buick with the money; is that right?

A. Yes, sir.

Q. Okay.

A. It wasn't a Buick. It was a Ford.

MR. MECOLI: Objection, Your Honor. That misstates the facts. It was a Ford.

THE WITNESS: It was a Ford, Ford station wagon.

MR. GAY: It was a Ford.

BY MR. GAY:

Q. At some point before that male left how many transactions had you observed?

A. It was, it was, you know, I lost count, truly.



Q. How may people were on your backup team?

A. I'm sorry. Excuse me, counselor?

Q. How many people were in your backup team?

A. Six, maybe eight, I believe.

Q. And were they located nearby?

A. I don't know exactly where they were located. They were supposed to be located strategically where, whatever location, if pursuit or if we had to follow somebody, you know.

Q. When the individual in the station wagon left, did you order the members of your backup team to arrest him?

A. No, sir.

Q. Well, how many transactions occurred before the individual that left in the station wagon went to the Buick or Lincoln, got out more packets and gave them to the two men who were working the street?

A. The contents of several bundles were sold.

Q. Okay.

A. You know.

Q. How many transactions were there?

A. Between then, it must have been fifteen, maybe twenty.

Q. Okay. When the individual went to the trunk and got out his supply.

A. Yes, sir.

Q. And distributed it to the other two men on the street.

A. Yes, sir.

Q. Was there some reason that you did not order their arrest at that time?

A. Yes, sir.

Q. What was that?

A. I was waiting for a delivery. The information I had, I'd be able to take off people delivering the items, delivering the product.

Q. Well, what information did you have about the delivery taking place?

A. I had information that Raphael Melendez lived at 913 Auburn Street. He was the one that had the workers on the street and that he had received, he would receive his cocaine. It would be delivered on Auburn Street and he used several cars to store the stuff. One was a Lincoln. There was another car on the north side of the street. I don't recall what that was now. It was an abandoned car. There was no tags on that.

Q. And when did you get that information?

MR. MECOLI: Objection.

THE COURT: Overruled.



THE WITNESS: I had gotten that information from numerous, from several places, from my own investigation, from other people that had been arrested, from people that called from the neighborhood.

BY MR. GAY:

And how long had you had that information before you went to make your surveillance that day?

A. I had been doing surveillance on that street.

Q. I beg your pardon?

A. I had been doing surveillance on that street and I had made several arrests, other arrests.

Q. Had you ever seen a delivery made to Ralph Melendez before from your surveillance point?

A. To him? No, sir.

Q. Well, when you got there that day and you saw the two men come into the block, regardless of whether they were at 9th Street or at some other location.

A. Yes, sir.

Q. And you saw Mr. Melendez start up his operation for the day by distributing the first set of bundles to the two men on the street, did you not then know that Mr. Melendez had a supply of cocaine coming in?

A. I knew he had a supply. I knew the supply wouldn't -- a quantity supply. It wasn't --

Q. It was what?

A. It was not ounces.

Q. Okay. Where did you get the information that it wasn't ounces?

A. That I saw. I saw into the trunk. I saw what he had. I saw what he took out.

Q. You saw what he took out but you didn't know what else was in there, did you?

A. No, sir.

Q. Okay.

A. When the defendant, when Melendez, Raphael Melendez, when he gave the keys to Santiago and left the area, I was under the impression that hopefully he would be going, possibly getting the drugs, be coming back.

THE COURT: He never did come back that day; is that right?

THE WITNESS: Not while we were there, sir. He came back to that location --

THE COURT: But I mean he did not come back during --

THE WITNESS: No, sir.

BY MR. GAY:

Q. Now, did you ever see the two men who were working the street?



A. I couldn't hear you, counselor.

Q. Did you ever see the two men that were working the street near the corner of 9th and Auburn?

A. They were on 9th, on the corner of 9th Street and Auburn. They were on the north and south side of Auburn Street. They would, sometimes they'd go out of my sight on the north side. They were at 9th and Auburn, Auburn and 9th Street, yes, sir.

Q. Now, were you present at the time that Mr. Lajara was searched?

A. I had stayed in my location. I observed, -- do you mean searched on the street? Frisked?

Q. Yes.

A. When he was stopped at another location, I was not there, no, sir. When he was brought back, he was identified. I identified him.

Q. And what was it about him that you observed at the time that he was brought back that caused you to be able to identify him?

A. His appearance, his clothing, you know, and himself. I made a point of recognizing him and the clothing he had was not hard to recognize.

Q. What kind of clothing was it?

A. I remember gold, gold shirt and gold pants, I believe.

THE COURT: Excuse me for just a moment.

MR. GAY: Yes.

(Discussion held off the record.)

BY MR. GAY:

Q. What you're saying is Mr. Lajara had on gold pants and a gold shirt?

A. Gold design on. One of them was gold and the other had designs on it. I'm not sure exactly how it was, you know. I'm not a fashion plate. I know he had gold pants and some goldish --

THE COURT: You could have fooled us, Officer.

BY MR. GAY:

Q. Do you remember which was gold and which had the design?

A. To be truthful, counselor, no. I remember they were baggie.

Q. I beg your pardon?

A. They were baggie, I remember that.

Q. They were large.

A. No. I think the style was baggie at the time. Large, whatever.

Q. Okay. You don't remember whether the shirt was gold or not?



MR. MECOLI: Objection, asked and answered.

THE COURT: Overruled.

THE WITNESS: To be truthful, I don't recall.

BY MR. GAY:

Q. Well, let me ask you this. Are you testifying today from what you have read about this case or can you actually go back in time and picture the events as they occurred?

A. I went over the case. I could not remember the case, you know. It's a year, fourteen months old. I remember basically the case. I reviewed it several days ago to refresh my mind. I looked over the notes of testimony in the beginning. That's what I looked over.

Q. Okay. And after looking over the notes of testimony, you still could not picture in your mind the events of the day, could you?

A. I remember basically, yeah. Yes, sir.

Q. But can you actually go back now and recreate in your mind and picture the events as they occurred on that day?

A. Yes, sir.

Q. Can you do that right now?

A. Yeah. I can run it down to you in a minute, sir.

Q. Sir?

A. I'll run it down to you, you know.

Q. Well, if you can really make that kind of mental picture in your mind of the events of the day, focus on the time when you first saw Mr. Lajara get out of that car and tell us whether he had on a gold top or a gold bottom.

A. I don't recall, sir. It didn't strike me as, didn't strike me as a point of identification at the time. It didn't stick with me. I couldn't tell you what it was.

Q. Well, haven't you just told us that the reason that you were able to identify him, namely point of identification, was that he was wearing gold?

MR. MECOLI: Objection, argumentative.

THE WITNESS: No, sir.

MR. MECOLI: Judge, he answered the question.

THE COURT: Overruled.

MR. MECOLI: He's testified.

THE WITNESS: No, sir. I saw the defendant. He was there. I got full face view. I got side view. Got him walking away. I saw their clothing. I gave a description of the vehicle and the car, the tag number. I believe I described when the defendants got out of their cars. I believe I described to the other officers what was going on and the descriptions of the persons. When the vehicle was stopped, they were brought back to me. I didn't see the vehicle. You know, they brought the defendants back and I identified them. It was within



five minutes of them leaving the scene, they were returned. Ten minutes, maybe.

BY MR. GAY:

Q. Now, the car that you say they were in was not brought back.

A. I didn't see it brought back to the scene.

Q. That car never came back into the block of Auburn Street where you were.

A. I didn't see it, counselor.

Q. Now, with respect to the other defendant who was in the vehicle, how was he dressed when you observed him that day?

A. To be truthful, I don't recall. I remember Lajara was in my opinion dressed more expensive than the other guy. That's the only impression I had.

Q. Were there any particular features about Mr. Lajara that you observed at the time that you say you saw him get out of the Toyota that you can now recall.

A. Any additional information?

Q. Yes.

A. Not that I could recall at this point, no, sir. No. Not without reading over, you know, going further into the notes.

Q. Well, we're asking for your recollection now.

A. Nothing.

Q. Was there something about him other than perhaps a gold top or a gold bottom and some other design on his clothing that you observed at the time that you saw him outside the Toyota that enabled you to identify him as the person that you had seen earlier when he was brought back to Auburn Street and when you saw him and made your identification to the police?

MR. MECOLI: Objection, asked and answered.

THE COURT: Are you talking about Lajara.

MR. GAY: Yes.

THE COURT: I'll sustain the objection. I think we've been through that.

THE WITNESS: I --

THE COURT: I've sustained the objection.

MR. MECOLI: It's sustained, Officer.

BY MR. GAY:

Q. Was there anything else about Lajara that you could observe other than his clothing?

MR. MECOLI: Objection. That's another way of asking the same question.

THE COURT: Yeah. I think he's gone through this. I think he stated his facial features or his view of his face.



BY MR. GAY:

Q. What was it about his face that caused you to recall him?

A. Me seeing him up to, less than ten minutes from the one point to the next. I saw him. I observed him. I recalled him.

MR. GAY: Thank you. I have no further questions.

THE COURT: All right. Mr. Corrigan?

BY MR. CORRIGAN:

Q. Officer Nimmo, from beginning to end, from when this surveillance started until it finished, you did not leave your surveillance position; is that right?

A. I was in several locations on the one level.

Q. Now, when you say you were at several locations on one level, you mean, do you not, that you were looking through several different windows but you were essentially at the same height in the same building?

A. Same structure, yes, sir.

Q. During that period of time, entire period of time. And that would be up to and including when everybody was brought back onto Auburn Street. You remained in that location and identified individuals over the police radio; is that right?

A. Over surveillance frequency we had, yes, sir.

Q. And now, you said that this operation involved six to eight officers.

A. You know, what I recall. It was basically the squad that I worked with. I think we had maybe ten people.

Q. So you're not sure now. There could have been as many as ten police officers including yourself involved in this operation.

A. It could be. I guess, yes, sir.

Q. And you don't exactly where the individuals were positioned but you would have had four or five cars in various locations around the area, Hutchinson Street, 9th Street, 10th Street, Auburn Street. Correct?

A. Yes, sir. They weren't on Auburn Street and they weren't on Hutchinson Street. I know that.

Q. Well, but some on 9th, some on 10th.

A. Yes, sir. In that area.

Q. In that general area. Now, you said that during the time that you were watching the retail sales take place on the street, that this was over a period of approximately two hours; is that right?

A. From the time I got there till, yes, sir, until the apprehensions were made.

Q. And during that time, approximately how many sales were made?

A. That I observed?



Q. Yes.

A. Guesstimating, it would be over fifty, you know.

Q. Now, when you say sales that you observed, do you mean by that that you were not in surveillance of the 900 block of West Auburn Street for the entire two hours that you were positioned there? It's possible that sales could have taken place in areas where you weren't able to see?

A. I'm sorry?

MR. SAGOT: I'd object to that question.

THE COURT: Well, I'll overrule the objection.

MR. SAGOT: Thank you.

MR. MECOLI: They're getting along so well.

MR. SAGOT: You stay out of it.

THE COURT: Do you want to restate the question, Mr. Corrigan? It's the subway going by.

BY MR. CORRIGAN:

Q. Now, you said that there were over fifty sales that you observed.

A. I would guesstimate, yes, sir.

Q. During this period. Now, you were observing the 900 block of Auburn Street for the entire time; is that right?

A. The whole block? No, sir.

Q. Well, you were observing the Lincoln and the individuals around that for the entire time, correct?

A. Yes, sir. In the area of 913, in that area.

Q. Now, while these sales were taking place was the gentleman Melendez, the one who drove away, was he positioned by the trunk of the Lincoln for the entire time?

A. Was he positioned by the Lincoln?

Q. Right.

A. No, sir. Most of the time he was out of my sight.

Q. I'm sorry. I couldn't hear you.

A. Most of the time he was out of my sight.

Q. Now, when you say he was out of your sight, he was just not on the street, in a building, or you just don't know where he was?

A. I remember he went into several houses on the south side. On the north side, he went to a point where he was out of my sight. He went up to the corner at 9th Street and he was out of my sight.

Q. And now, while this was going on, it's your testimony that Mr. Labron and Mr. Santiago were conducting street sales at various locations, correct?

A. In the immediate area, yes, sir.



Q. And it was your testimony previously that while you were making these observations, the street vendors Mr. Santiago and Mr. Labron ran out of product several times, correct?

A. Yes, sir.

Q. And now, when that occurred, Mr. Melendez would reappear and go to the trunk of the Lincoln?

A. Yes, sir.

Q. And Mr. Melendez was the individual who had the key to the trunk of the Lincoln at this time as far as you knew; is that right?

A. He opened the key. He opened the trunk with a key. Yes, sir.

Q. And now, during the time when you were observing these sales taking place, you never saw anyone other than Mr. Melendez open the trunk of the Lincoln while he was present; is that right?

MR. SAGOT: Your Honor, I apologize for interrupting counsel. May I impose upon the Court for the a five-minute recess?

THE COURT: We'll take a five-minute recess. Why don't you make the call.

MR. MECOLI: Sure.

MR. SAGOT: Thank you, Your Honor.

THE COURT: We'll take five.

COURT CRIER: Very well, Your Honor. The Court will take a five-minute recess.

(A brief recess was taken.)

THE COURT: Mr. Mecoli, our court staff will hold for you if you can't get through.

MR. MECOLI: I'm on the phone right now, Your Honor.

THE COURT: Before you hang up, tell me what you found out. Did they pull the stuff out?

MR. MECOLI: That's what's going to take some time, to pull it out. It's locked from the bin.

THE COURT: Have them pull it out and give them the courtroom number and let's have them call us and tell us what's there. If we have to prove it, we'll prove it. But let's have them call us and see if we can agree upon it. I'll tell you what. I don't want to wait for him to do that. Just let's have Mr. Clark hang on the phone. He's very experienced in these matters. He can convey the message.

Mr. Corrigan, please proceed.

BY MR. CORRIGAN:

Q. Officer, after the Toyota arrived on the scene --

A. Counselor, could you?

Q. After the Toyota arrived on the scene and you called for your backup to make arrests, Mr. Santiago and Mr.



Labron were still in the area of the 900 block of Auburn Street; is that right?

A. Yes, sir.

Q. And if you can recall, how many officers responded immediately to your request into the 900 block of West Auburn Street?

MR. MECOLI: Objection, Your Honor. How does this go to the motion?

THE COURT: Well, I would hope you would know. So I'm overruling the objection. Go ahead, Mr. Corrigan.

THE WITNESS: How many officers responded?

MR. CORRIGAN: Immediately.

THE WITNESS: Onto Auburn Street?

MR. CORRIGAN: Yes.

THE WITNESS: There was at least four of them there, at least four.

BY MR. CORRIGAN:

Q. And this was just to arrest Mr. Santiago and Mr. Labron. Other officers took Mr. Lajara and Mr. Ramos into custody; is that right?

A. Yes, sir.

Q. Now, Mr. Labron and Mr. Santiago were arrested approximately 2:15, 2:20, something like that; is that right?

A. Yes, sir.

Q. In the afternoon?

A. Two, yes.

Q. And there was testimony earlier today that this surveillance lasted for approximately two hours; is that right?

A. Yes, sir.

Q. Now, you recall testifying at a preliminary hearing with respect to this case, correct?

A. I recall testifying, yes, sir.

Q. Now, at that time, directing your attention to page thirteen, you responded to the following questions the following way.

Question: How long before you first saw the two individuals wearing red shirts when you set up your surveillance?

Answer: Immediately.

Question: At what time of day did you set up your surveillance?

Answer: Just about two. Just prior to two.



Do you recall that being your testimony on that date?

A. No, I don't, sir.

MR. CORRIGAN: Your Honor, may I approach the witness?

THE COURT: Yes.

THE WITNESS: Yes, sir.

BY MR. CORRIGAN:

Q. Now, do you recall making those responses to those questions?

A. No. I remember testifying. I don't recall the questions, no, sir.

Q. But if I understand your testimony today, what you're saying is that your testimony at this time with respect to when this surveillance commenced is incorrect and the surveillance actually commenced sometime around twelve noon; is that right?

A. It was after twelve when I started, yes, sir.

Q. When you say it was after twelve, does that mean it was five o'clock in the afternoon or does that mean it was five after twelve?

A. No. It was ten after, quarter after, I believe.

Q. Ten after or quarter after twelve noon; is that right?

A. I believe so.

Q. Now, Officer Nimmo, you were the assigned officer in this arrest; is that right?

A. I believe. I haven't seen the 49. I believe I was.

Q. Well, if I show you the 49, would you be able to determine from that whether or not you were in fact the assigned officer?

A. My name should be on the bottom, yes, sir.

Q. I guess that would be D-1 for identification purposes.

A. Yes, sir.

Q. You are the assigned officer, are you not?

A. Yes, sir.

THE COURT: Let's just have it marked. Sylvester, will you mark this 49 D-1?

MR. SAGOT: Judge, that's my copy and I have no problem with that. If I could just take from the --

THE COURT: It doesn't have to be submitted. We can just mark it.

COURT CRIER: We can mark it D-2, Your Honor. If you'll recall, we had the slip of paper marked before.

THE COURT: Okay. D-2.

MR. SAGOT: That's my copy of the 49.



THE COURT: We'll give it back to you.

MR. SAGOT: Thank you, sir.

BY MR. CORRIGAN:

Q. Now, Officer, you signed this and you prepared it; is that right?

A. Yes, sir.

Q. Now, I'd just like you to look at section two, interviews and interrogation. It says complaint. Now, the first sentence of that document reads as follows, does it not? On Friday, 8/24/90, I started a surveillance of the 900 block of West Auburn Street at approximately two p.m.

Now, that's what it says, does it not?

A. Yes sir.

Q. And you prepared this yourself, did you not, sir?

A. Yes, sir.

Q. Now, about halfway down the paragraph here, it states: At approximately 2:10 p.m., Raphael Melendez gave Jose Santiago keys and then Raphael Melendez drove off in a Ford station wagon; is that correct? If you would look at it.

A. Yeah. I believe that's what's on here. Yes, sir. Yes, sir.

Q. And again further down there, it says at approximately 2:18 p.m., a blue Toyota parked behind the blue Lincoln and, et cetera, et cetera.

Now, that's also in the body, is it not?

A. I believe, yes, sir.

Q. And a transaction which you characterized as taking a few seconds transpired and then you called for your backup and people were arrested; is that correct?

A. The transaction took place. When the Toyota moved, drove away you're talking about at this time?

Q. That's correct.

A. Yeah. It didn't take long.

Q. Now, that makes a total of less than twenty minutes, doesn't it, Officer?

A. No, sir. If I could read the first, beginning of it again. On Friday, 8/24/90, I started the surveillance at 900 block of West Auburn Street. At approximately two p.m., I observed hispanic male later identified as Labaron.

Q. Now, okay.

A. Yeah.

Q. But surely you're not saying approximately two p.m. actually means about 12:05, are you?

A. No, sir.



THE COURT: Does any counsel have, since we seem to be at a question of punctuation here, does anybody have an objection to my looking at the exhibit?

MR. SAGOT: No, Your Honor.

MR. GAY: No, sir.

MR. CORRIGAN: Certainly not, Your Honor.

BY MR. CORRIGAN:

Q. Now, also in paragraph one where it says origin and details of complaint.

A. I'm sorry. Okay. Yes, sir.

Q. Paragraph A. It also states here on Friday 8/24/90 at approximately two p.m., the following hispanic males did conspire, et cetera, et cetera.

A. Yes, sir.

Q. Now, you wrote that also, did you not, Officer?

A. Yes, sir. If I can.

Q. Well, I haven't asked a question, Officer.

THE COURT: Well, yeah. Were you trying to explain the last answer?

THE WITNESS: Yes, sir.

THE COURT: Go ahead.

THE WITNESS: The other officers you're talking about being set up on the surveillance --

MR. CORRIGAN: Your Honor, I'd object. This is totally unresponsive to any of my questions.

THE COURT: Okay. I'll sustain the objection.

BY MR. CORRIGAN:

Q. Now, you were in your surveillance position when, when Mr. Labron and Mr. Santiago were arrested, right?

A. Yes, sir.

Q. And it was your testimony that there was at least four, could have been more officers participating in that arrest.

A. Yes, sir.

Q. Now, there came a time when the trunk of the Lincoln was searched by, I believe you testified it was Officer Scarpati; is that right?

A. Scarpato.

Q. Scarpato.

A. Yes, sir.

Q. Now, did that take place immediately after Mr. Labron and Mr. Santiago were arrested in the 900 block of West Auburn Street or were the other males brought back and identified by you first and then other officers came back with them? If you can recall. Do you know when that took place?



A. I believe as soon as the area was secured, they searched it. I don't recall if the other two were back yet.

Q. You don't recall.

A. No, sir.

Q. Now, do you recall seeing Officer Scarpato? You testified you could see directly into the trunk; is that right?

A. Yes, sir.

Q. And you were able to see a key passed back and forth between --

A. I'm sorry?

Q. You were able to see the key to this trunk passed from Mr. Melendez to Mr. Santiago and around about; is that correct?

A. Yes, sir.

THE COURT: Excuse me.

COURT CRIER: Judge, the chemist is on the phone.

THE COURT: All right. We'll let the DA take the call now.

(A brief recess was taken.)

THE COURT: First of all, let's find out, is there an opaque bag there that's not listed on the report?

MR. MECOLI: The chemist reports the bags as clear, Your Honor.

THE COURT: Pardon me?

MR. MECOLI: The chemist reports the bags as clear.

THE COURT: There is no opaque bag. Are you willing to stipulate that if called, he would testify to that effect?

MR. MECOLI: That the chemist would testify to that? Yes, Your Honor.

THE COURT: Yeah. Is that satisfactory to counsel?

MR. GAY: Yes, sir.

MR. SAGOT: Yes, Your Honor.

MR. CORRIGAN: Yes, Your Honor.

THE COURT: Please proceed, Mr. Corrigan.

BY MR. CORRIGAN:

Q. Now, so you observed Officer Scarpato open the trunk of the Lincoln with a key in order to go into it; is that right?

A. No, sir. I don't think he opened it with a key.

Q. Can you recall how he opened it?

A. I believe the trunk was forced.



Q. Now, from your position were you able to see Mr. Labron searched in any way?

A. I saw them, yeah, make apprehension on him. I didn't watch them to see. They were frisked, I know, I imagine. I didn't take notice of that.

Q. I'm not asking you what you imagined, Officer.

A. They were placed under arrest and I paid no mind to them.

Q. There was a big crowd of people around and I want to know what you could see. Now, it's your testimony at this time, is it not, Officer, that you don't know whether or not a key was recovered, in fact?

A. I don't know. I didn't see a key.

Q. Now, so you would not know whether or not any money or drugs or anything like that was found on the person of my client; is that right?

A. I know there was money confiscated and put on property receipts. Confiscated from who, I don't recall. I have it written down if you want.

Q. Well, no. I just want to know if you knew specifically with respect. If you don't know, you don't know.

A. I don't know, sir.

MR. CORRIGAN: I have no further questions for the officer.

MR. SAGOT: Your Honor, before you return to the District Attorney, could I ask just a couple of more questions?

THE COURT: Yeah, sure. That will make it easier for the District Attorney to do his redirect if he has any.

MR. SAGOT: With Your Honor's permission.

THE COURT: Go ahead.

BY MR. SAGOT:

Q. Officer, the Toyota vehicle in question that you mentioned the tag number on, as part of the your investigation were you able to determine the ownership of that vehicle?

A. I don't recall. I imagine I ran it through. I don't recall specifically at this point.

Q. And would it be the same response for the Lincoln?

A. The Lincoln I believe came back to Melendez. I believe it did.

Q. Came back. Did you radio that tag number in during the course of your surveillance?

A. No. I think it was run in on the computer after I got in, if I recall.

MR. SAGOT: And if I may approach the witness only because he has my copy of the 49, Your Honor.



THE COURT: Yes.

BY MR. SAGOT:

Q. That reference to Melendez's ownership of the Lincoln in question, does that appear anywhere in your 49, if you recall?

A. I don't recall. I haven't seen the 49 since it was done.

Q. Okay. And the Toyota, you don't know if you ran that or not as to who might be the owner of that vehicle?

A. Procedure, I normally would. I believe I did.

Q. But the end result of that procedure, assuming you did perform it, is not recalled by you and is unknown at this time.

A. I don't recall, no, sir.

Q. Now, in direct response to my question earlier, I asked you how many retail drug transactions went down during the course of your surveillance and you said approximately one hundred. To Mr. Corrigan's question as to the same period of time, you answered approximately fifty.

A. No, sir. One I referred to as I guesstimated packets. I remember specifically stating I believe it would be a guesstimate on packets, not persons.

Q. Which would be the guesstimate on packets?

A. At least a hundred.

Q. So you're saying that there were at least fifty two-bag buys.

A. I'm sorry.

Q. At least fifty two-bag purchases.

A. I would say, yes, sir.

MR. SAGOT: Thank you. I have no further questions.

THE COURT: Mr. Gay, anything further?

MR. GAY: Judge, it's just repetitious, really. What I would rather do if it's necessary would be to call the stenographer, Mr. Natale, who's up on duty in Room 675 today, unless we can come to an agreement on some of the excerpts.

THE COURT: You mean the ones that you dealt with previously?

MR. GAY: Well, there are those and I think there's one other passage, Your Honor.

THE COURT: Is there any objection to my reading portions of the recorded testimony.

MR. MECOLI: I have no problem, Your Honor.

THE COURT: I'll read the whole thing if you want.

MR. GAY: And I have no further questions of the officer.



THE COURT: Let's go to the District Attorney and see if you have any redirect.

REDIRECT EXAMINATION

BY MR. MECOLI:

Q. The person who you were investigating at that block was Raphael Melendez; is that correct?

A. Yes, sir.

Q. You didn't got in immediately and arrest him when you saw these packets being handed out; is that correct?

MR. GAY: I can't hear.

THE COURT: Restate the question.

BY MR. MECOLI:

Q. When you originally saw these packets being handed out when Mr. Melendez was there, you didn't direct backup officers or yourself, you didn't go down and arrest him immediately; is that correct?

MR. GAY: Objection, leading.

THE COURT: Overruled. He's already testified to that effect.

THE WITNESS: That is correct.

BY MR. MECOLI:

Q. Was he eventually arrested?

A. Yes, sir.

MR. SAGOT: I'd object to that, move to strike.

THE COURT: I'll sustain the objection.

BY MR. MECOLI:

Q. In connection with this case, was Mr. Melendez ever apprehended?

MR. CORRIGAN: Objection.

MR. SAGOT: I again object. It's outside the record.

THE COURT: Yeah. I think that the point is this. The officer has already testified that the reason he didn't have his people stop Melendez was because he thought Melendez was going to pick up some drugs. That was his testimony. Now, I don't know how much further you want to develop the point.

MR. MECOLI: Your Honor, the only point I'm developing is counsel has raised an inference that the officer was supposedly investigating this male but he didn't go in and arrest him when he had the chance, and what I'm doing is bringing out what the officer did do as to Mr. Melendez. It goes to his credibility.

THE COURT: But the question as properly stated is this: Officer, do you to your personal knowledge know whether Mr. Melendez was arrested as a result of the observations that you made of him on this date of August twenty-fourth, 1990?

THE WITNESS: Yes, sir. He was arrested.



THE COURT: Thank you. I think we need go no further on that point.

MR. MECOLI: Thank you, Your Honor.

BY MR. MECOLI:

Q. Now, referring you back to the notes of the preliminary hearing held on September twelfth, 1990. You stated before you didn't recall any of the specific questions and answers that day; is that correct?

A. That's correct, sir.

Q. Do you remember them now?

A. Not really. I remember testifying. The specific questions I don't recall.

MR. MECOLI: I'd ask you to look, if I could approach the witness, Your Honor.

THE COURT: The only question I would ask is just like Mr. Gay wants me to read portions, do you want me to read certain portions too? Would that be easier? In a non-jury trial, sometimes, unless there's a specific point that needs to be made, I can just read it.

MR. MECOLI: Your Honor, in this case I would ask if the witness could see this.

THE COURT: Okay, all right. What page?

MR. MECOLI: This is on page five. It's the second question down. Could you look at the question and answer, second one down?

THE WITNESS: Yes, sir.

MR. MECOLI: Doesn't that state --

MR. SAGOT: I would object, Your Honor. This is the District Attorney testifying, not the officer.

THE COURT: Why don't you read the question and answer that you're referring to. Mr. Sagot has a set of the notes right here. Just read it into the record.

BY MR. MECOLI:

Q. Could you read the part where it says question, I'd like to direct your attention to August twenty-fourth, 1990, at 12:18 p.m. Could you read that part?

A. Yes, sir.

Q. Now, is 12:18 p.m., is that when you began your surveillance that stay?

MR. SAGOT: I would renew my objection. These are not the witness's words. These are the District Attorney's words.

MR. GAY: Judge, I object to it. This is not a prior consonant statement.

MR. SAGOT: Of this witness.

THE COURT: Let's put it this way. I'm going to ask some questions on this particular issue which are not related to the notes of testimony because I have a question about this which I was going to ask anyway and I might as well ask it now.



Now, Officer, you've been referred to the portions of your 49 and you referred to certain portions of the preliminary hearing notes which suggest that you set up your surveillance at two o'clock, not 12:15. Now, today, can you tell me with certainty what time it was that you set up your surveillance?

THE WITNESS: If Your Honor pleases, I started after noon, quarter after twelve, in that area. I set up prior to the other officers getting out there. There's certain things I had to do. I did that prior to them coming out.

THE COURT: Why does your 49 say that you set up the surveillance at two?

THE WITNESS: If that's, I'm not sure if that's the time that I started informing them that what was going on and who I had. I don't recall.

MR. SAGOT: Judge, and the notes of testimony.

THE COURT: Well, wait, wait, wait. If there's a question to be asked, we'll do it in order now. Now, I asked that question without regard to the previous statement. It's the District Attorney's turn to finish his redirect.

BY MR. MECOLI:

Q. Based on your recollection of the events of that day, what did you have to do prior to your brother officers coming on the scene?

A. I had to get to that location and set up the surveillance, get permission and set up the surveillance, be ready for when they were there.

Q. And what time was it when you originally saw the defendants?

MR. CORRIGAN: Objection.

THE COURT: Which defendants are you referring to?

MR. SAGOT: The first defendants he saw.

MR. MECOLI: The first defendants. Excuse me. That would not be the two that were in the Toyota. That would be the other defendants.

THE WITNESS: That was shortly after I set up, I believe. I don't know if I had the time written down. It would be shortly after. It would be by one.

BY MR. MECOLI:

Q. What time was it that you called in your other officers to make arrests?

A. To make the arrests? They come in. Everything went down at 2:18. I believe that's the time I went out on radio with the information to stop the car and going into Auburn Street.

Q. And what did you do between the time when you set up your surveillance and the time when the officers came in?

A. What did I do? I had to talk with the people, you know, for the surveillance, for permission for the surveillance. I went up. I set up for the surveillance. And, you know, I waited for the officers to be in position.



Q. Now, Officer, Mr. Sagot brought out that you were surveying this area.

MR. SAGOT: Surveilling.

BY MR. MECOLI:

Q. Excuse me. Surveilling this area. When you were surveilling this area, what was the reason that you were surveilling this area as opposed to another?

A. For, to investigate Raphael Melendez. But I believed there was drug traffic initiated by him at that location.

Q. Could you tell us all the information that you possessed at the time when you set up this surveillance?

MR. SAGOT: Objection, Your Honor.

THE COURT: On what grounds, Mr. Sagot?

MR. SAGOT: Number one, it's been asked and answered on at least three separate occasions and it's improper redirect. The grounds that he had have no bearing. He said that he had information on Melendez. He said that he talked to several people who live in the area. He said he talked to several other people in the investigation.

THE COURT: I heard his testimony. I'm going to overrule the objection. You can answer, Officer.

THE WITNESS: I'm sorry. Could you repeat your question?

THE COURT: What information did you have about Mr. Melendez before you went out there that day?

THE WITNESS: I had information that Mr. Melendez lived in 913 Auburn, that on the eastern half of Auburn Street he was the one that was selling. He had the people employed selling his cocaine out there. He had a heavy foot traffic and that they were storing cocaine when it was brought in. It was stored in either the abandoned car. It was a dark color. I don't recall. Or the Lincoln that was parked on the curb.

BY MR. MECOLI:

Q. Now, where exactly was the Lincoln parked?

MR. SAGOT: Objection.

THE COURT: Do you mean on this day when it was out there?

MR. MECOLI: Yes. On this date where was that Lincoln parked?

THE COURT: I think he's already testified to that. I'll sustain the objection. Sixty feet from the corner of 9th and Auburn, the south side facing east. Correct, Officer?

THE WITNESS: Yes, sir.

BY MR. MECOLI:

Q. Was the Lincoln parked on the street?

MR. CORRIGAN: Objection.



THE COURT: Overruled.

THE WITNESS: No, sir. I believe it was on the pavement, on the curb.

BY MR. MECOLI:

Q. When you saw the Toyota pull up, was the Toyota on the street or on the pavement?

THE COURT: Do you mean the street or the sidewalk?

MR. MECOLI: Yes.

THE WITNESS: Sidewalk. I believe it pulled up directly in front of it on the pavement.

THE COURT: On the pavement. By that do you mean the sidewalk.

THE WITNESS: I believe. Yes, sir. I believe.

BY MR. MECOLI:

Q. Now, after Mr. Melendez hands out the packets to Santiago and Labron from the trunk, you say you observed them involved in various transactions; is that correct?

MR. GAY: Judge, I object.

THE COURT: Sustained. I mean, he's already testified to that. It's asked and answered repeatedly. So I'll sustain the objection.

MR. MECOLI: I'm sorry, Your Honor. I'm leading up to another question.

THE COURT: All right. Then just ask the other question, please.

BY MR. MECOLI:

Q. At the time you saw Labron and Santiago engaged in what you call transactions, were they always together or did they separate?

A. They were walking. They were separated. They walked back together. They were, you know. They would walk up to the customers as they would come. The customers would walk up to them. They would be together.

Q. Do you remember what you were wearing this day?

MR. CORRIGAN: Objection.

THE COURT: Sustained.

BY MR. MECOLI:

Q. Do you have any doubt that these are the two individuals that you saw in the Toyota that day?

MR. CORRIGAN: Objection.

THE COURT: Overruled.

THE WITNESS: None whatsoever.

BY MR. MECOLI:



Q. Do you have any doubt that that was the individual that you saw outside selling in the street that day?

A. No, sir.

MR. MECOLI: Your Honor, I have nothing further.

THE COURT: Anything further from the defense?

MR. SAGOT: Your Honor, if I could.

THE COURT: It's recross.

MR. SAGOT: Right.

RECROSS EXAMINATION

BY MR. SAGOT:

Q. Pursuant to the District Attorney's question, do you have any doubt that your surveillance began at 12:18 p.m.?

A. Do I have any doubt?

Q. Yes, sir.

A. If that's the time I put down, that's when I started.

Q. That would be a yes or no answer, Officer. Do you have any doubt?

A. I believe that's it.

Q. Yes. And if that's the time you put down, put down where, Officer?

A. I'm sorry, counselor. Put down the time where?

Q. When you say if that's the time you put down, put down where? On the 49?

A. I, you know, I don't know why it's down as two o'clock. That I don't know. I don't know why.

Q. Well, the fact that it's down at two o'clock in the 49 in two separate places, the beginning of the 49, which has been marked as D-2.

A. Yes, sir.

Q. Which says origin and details of complaint. It says on Friday, August --

THE COURT: We've already been through that. Please.

MR. SAGOT: Then I'll withdraw that, Your Honor.

BY MR. SAGOT:

Q. Then if you don't know why it says that on the 49, then I refer you to page thirteen of the notes of testimony where you were asked, quote, at what time of the day did you set up surveillance?

Answers: Just about two. Just prior to two.



If you can't understand why it appears on the 49, can you understand why it appears on the notes of testimony?

A. What I can understand, if you're asking me what I understand.

Q. Yeah.

A. The discrepancy I would believe is from when I started the surveillance and possibly when I'm contacting the other officers when it's official what's going on.

Q. Well, I'll read this question again. Maybe you don't understand it.

THE COURT: You don't have to read it. Please.

MR. SAGOT: Very well.

BY MR. SAGOT:

Q. Now, in terms of relationship to the time you set up your surveillance according to your testimony today at 12:18 p.m., at what time in relationship, how long after that did Melendez leave the area in that Ford station wagon? How long after you set up that surveillance at 12:18?

A. Shortly. Shortly after two.

Q. Shortly after two. So Melendez was in the area for one hour and forty-five, one hour and fifty minutes?

A. He was there for a good while working around.

Q. How long after that did the blue Toyota pull up?

A. After what, counselor?

Q. After Melendez left?

A. I'd say ten minutes.

MR. SAGOT: Thank you. I have no further questions.

THE COURT: Mr. Gay, anything?

BY MR. GAY:

Q. Officer, how many people were in the location where you were during the time that you made the surveillance that day?

A. The immediate area? There was no one in my immediate area.

Q. In the house where you were, or in the building where you were.

MR. MECOLI: Objection.

THE COURT: Well, let's say in the structure that he was in.

THE WITNESS: At one point, there were one, two other people at one point that I know of. Then after I was in there, I don't know where they were.

BY MR. GAY:

Q. Did they admit you?



MR. MECOLI: Objection.

THE COURT: Did they what?

MR. GAY: Admit you.

MR. MECOLI: Objection.

THE COURT: Well, overruled.

THE WITNESS: Yes.

BY MR. GAY:

Q. And were those people there when you left that day?

A. No, sir.

MR. GAY: May it please the Court, at this time I move for the disclosure of the identity of the individuals who admitted this officer to that premise that day for the reason that it is obvious at this point that the issue with respect to time is a crucial one. On the one hand, we have an observation that took place over a period of perhaps eighteen minutes, if you believe this officer's initial report, which also tracks that time to other events immediately following the two o'clock time frame. He repeats that same testimony in the notes of testimony and he has testified to a series of transactions that, according to his testimony and according to common sense, must have taken place over a long period of time. That issue of time has become crucial with respect to this officer's credibility and I move for the disclosure of the names and addresses of those individuals so that they may be interviewed and subpoenaed to testify in this case if it's necessary.

MR. SAGOT: I would join in that request, Your Honor.

THE COURT: Does the DA have a response to that?

MR. MECOLI: Yes, I do, Your Honor.

THE COURT: I'm sure Mr. Corrigan joins.

MR. CORRIGAN: I join, Your Honor.

MR. MECOLI: It is for these persons that the officer doesn't want to reveal the confidential location in the first place, and to reveal them now and to bring them into the courtroom would place them in great risk.

THE COURT: Well, of course, you're familiar with Carter Pritchett, are you not?

MR. MECOLI: Yes, I am, Your Honor.

THE COURT: And there's some pretty strict requirements with respect to the circumstances. In Carter Pritchett, as you know, those are cases where you have informants who were present at a drug transaction and in Carter Pritchett, the Court has, the Supreme Court has in essence said that if you have a informant who's present and the only non-police witness at a drug transaction, his identity has to be disclosed.

MR. MECOLI: That's correct, Your Honor.

THE COURT: Isn't that analogous to this situation?



MR. MECOLI: I would say this is more analogous to Commonwealth versus Miller, Your Honor. We're talking about a situation where they want the name of an informant and the defense is not entitled to that absent a showing. In I believe it's Commonwealth versus Jackson, they are not entitled to the informant's name regardless.

THE COURT: Well, that's not an accurate statement of the law. The law says that the Court has to, as far as Miller goes, which is a successor to Hall, that if there's a, which is in a search warrant context, not a guilt or innocence context, that in a search warrant context the Court has to balance the danger to the informant versus the need of the defense to conduct their defense.

It seems to me that Carter Pritchett actually says when we're talking about eyewitnesses going to guilt or innocence, that the requirements are stricter there.

Now, let me ask you this. Was there any testimony about the possible existence of these witnesses at the preliminary hearing?

MR. MECOLI: None.

THE COURT: So this in fairness would be the first time that the defense would be aware of this; is that correct?

MR. GAY: No question about that, Your Honor.

THE COURT: Is there any reason they ought to be aware of this? I mean, he didn't testify as to what his location was before.

MR. MECOLI: No.

MR. SAGOT: The preliminary hearing notes clearly state that that is a confidential location.

THE COURT: What I'm going to do is hold that under advisement for the moment and just see if you have any questions for the officer. I will rule on that but I'm not going to rule on it right at this moment.

MR. MECOLI: Your Honor, we'd ask you to, before you rule on that, hear from the officer even in camera with the a attorneys.

THE COURT: We'll get to that in a minute. I want to see if we can conclude what other questions may be had for the officer. Mr. Gay, do you have any further questions for the officer?

MR. GAY: Judge, anything else that I want to develop can be done from the notes of testimony at that preliminary hearing unless it's already in the record.

THE COURT: Mr. Corrigan, do you have anything further?

MR. CORRIGAN: I just have a couple of questions.

BY MR. CORRIGAN:

Q. Officer, you stated that you were in this location on this particular day pursuant to information you received from various individuals regarding the activities of Mr. Melendez. Now, do you possess any contemporaneous notes that you took at the time that you received this information regarding Mr. Melendez?

A. I don't believe so, no, sir.



Q. And did you put in the 49 that you wrote regarding --

A. Counselor, I couldn't hear you.

Q. Did you refer to this information that you received from various individuals? I know you characterized them as other officers, neighborhood residents, people that have been arrested in and around that location in previous weeks. Did you make any reference to information received from those individuals in the 49 which you prepared with respect to the arrests of the individuals who are here in court today?

A. I don't recall.

Q. Well, if you were shown the 49, would that refresh your recollection as to whether or not you referred to that information?

A. Sure. What part of it, counsel?

THE COURT: Is there something there that you wish to direct his attention? Do you believe it's in there or it's not in there?

MR. CORRIGAN: It's not in there, Judge. I'd just like him to satisfy himself that there's no reference whatsoever.

THE COURT: Is there any objection to me reading the 49?

MR. MECOLI: I have no objection to that, Your Honor, but I just object to this questioning. Admissions are not inconsistent statements.

THE COURT: Well, I know that is the law in Pennsylvania. I think the question is not whether this is an inconsistent statement. I think the question is did he record any information about the information he had before he went out there, and I think that's a legitimate question to see whether any statement may exist.

All right. Mr. Corrigan, do you have anything further?

MR. CORRIGAN: Not at this time, Judge.

THE COURT: Do you have anything further for the officer?

MR. MECOLI: No, Your Honor.

THE COURT: I just have one or two questions for the officer.

BY THE COURT:

Q. Officer, was the Lincoln impounded?

A. At that time, no, sir. The Lincoln could not be started.

Q. Pardon me?

A. The Lincoln could not be started. It was a '77 Lincoln and it wouldn't start and they just didn't bother impounding it.

Q. Just left it there.

A. Yes, sir. It was a '77.



Q. Could you describe the physical condition of this car to me?

A. The outside, the side and the rear that I saw looked fairly decent. It wasn't in new condition.

Q. Did it have four tires on it?

A. Four tires. It had the glass. It looked like it would be legal for the highway.

Q. It had a tag?

A. Yes, sir.

Q. Is it your testimony that before you went out to Auburn Street you had specific information about this Lincoln automobile before you got there that day?

A. That and another car, yes, sir.

THE COURT: Does either counsel have any questions based on the Court's questions?

MR. SAGOT: No.

MR. MECOLI: None, Your Honor.

THE COURT: All right. You can step down, Officer. Thank you.

(Witness excused.)

THE COURT: I think at this point, I'm trying to conclude some things here. Are there specific, well, could I see the notes of testimony from the preliminary hearing from the Quarter-Sessions file? And also, what

I would intend to do is to read these this evening because I understand that counsel has, nobody has an objection as to my doing so. That will speed it up. I assume only as to the testimony of Officer Nimmo. Is he the only one that testified?

MR. MECOLI: Yes, he is, Your Honor.

THE COURT: And then does somebody have a copy of the 49 for me to take with them?

MR. SAGOT: Your Honor, I'll give you mine. Also at some point in time I was going to move in this property receipt which I assume is essentially stipulated to.

THE COURT: I assume he has somebody else to testify.

MR. MECOLI: That's correct.

THE COURT: The confiscating officer.

MR. MECOLI: Yes, sir.

THE COURT: Do you have something else to offer?

MR. MECOLI: Yes, sir, Officer Adam. He stopped the car, the Toyota, and arrested them.

THE COURT: All right. Now, let's talk for a minute about the issue of the, that Mr. Gay has raised about disclosing the identity of these people.

MR. MECOLI: Could I, Your Honor, see you in the back with counsel?



THE COURT: First let's talk about law for a minute. The Hall-Miller cases about revealing the identity of an informant are a line of cases that do not go as I understand it to eyewitness informants. They go to informants.

MR. GAY: Yes, sir.

THE COURT: There's a difference between an informant and an eyewitness. An informant can also be an eyewitness as they were in Carter Pritchett. In Carter Pritchett, which I recently had occasion to examine ad nauseam and to find that I had ruled that an eyewitness informant whose identity did not have to be disclosed, I subsequently after reviewing those cases very closely learned that the requirements in Carter Pritchett are very strict. And in those particular cases, the courts have held, the courts held that where an eyewitness, informant eyewitness is the only non-police witness to an alleged transaction other than the defendant, that his identity has to be disclosed, which in effect makes the Commonwealth not use that person, lose the case unless they're willing to reveal the identify of the informant. I ruled in the Commonwealth's favor and then after reading the cases reversed myself. So I've been through those cases.

Now, the difference that we have here is that we're really not talking about eyewitnesses to guilt or innocence. We're talking about someone who was an eyewitness to an element of a motion to suppress. So that I sincerely doubt that any of you are going to be able to point me to case law that's right on point. You have it?

MR. GAY: Well, Judge, I think that maybe there's not a case on point but there is an analogy on

point. A motion to suppress evidence, according to our own Supreme Court, for the purpose of tolling Rule 1100, is the first step in the fact-finding process toward guilt or innocence. Our own Supreme Court has said that. Not only that but at trial the same motion would be made. This issue is crucial. There's absolutely, we are maybe hours away from having the same thing done. And when you talk about guilt or innocence, the only reason that a decision has not been made by our Supreme Court, I suggest, with respect to the disclosure of, and a truly eyewitness in a motion to suppress evidence, is because there's no such case that's gone before our Supreme Court. There's no case that either denies or grants the defense the identity of an eyewitness in a motion to suppress evidence simply because that issue has not been raised. I suggest to the Court, though, the person is nonetheless an eyewitness and we are well on the way in the process of determining guilt or innocence and there should be no difference.

THE COURT: Now, before I hear from the Commonwealth, do either defense counsel wish to say anything?

MR. SAGOT: No. I would join in Mr. Gay's argument, Your Honor.

MR. CORRIGAN: I also join, Your Honor.

THE COURT: All right. I'm prepared to hear from you on the legal aspects of this. Do you wish to add anything to this?

MR. MECOLI: Your Honor, I think the most valid point that's been made is yours. It's that the person is not an eyewitness to the crime that's alleged in this case at all. They are a witness to a collateral issue,



if you will. They can verify something that the witness has said on the stand in the motion or not verify it and that's their purpose. And what I would suggest, Your Honor, is that in any case where a witness takes the stand and says, well, I arrived at this time or I arrived at that time, well, there must have been someone that saw you. Of course. There may have been. But that doesn't make that person available to be revealed, whether it be an informant or otherwise. And these people that are, that stand in danger of being revealed here stand in some danger.

THE COURT: Let me just state one thing. The Court does not take lightly the concept of revealing the name of a citizen who allegedly cooperated in a drug investigation. That's something that I take very, very seriously. So let there be no mistake about that. I don't take that. That is a very serious, serious decision for a court to make. So you need not reinforce that point.

MR. MECOLI: Correct. Now, Your Honor, there is a case that came down after Miller that does deal with the Commonwealth's disclosure of informants. I do not have it with me, unfortunately, and I'd like to have a chance to go get it and to review it to see if that's applicable to this situation. I don't know if it is or not, quite honestly.

THE COURT: Well, it seems to me that on this particular issue, there are some generic questions that I'd just like to take two or three minutes and ask Officer Nimmo before we break for the evening and just to maybe set a little stage for this and see. Mr. Clark, could you ask Officer Nimmo to come in again? I must also say that the Court is very reluctant to conduct any proceeding in camera. The constant message I get from

the Supreme Court is that that is not a procedure that they look favorably on.

Officer, if you could just take the stand again for a moment.

THE WITNESS: Yes, sir.

BY THE COURT:

Q. Officer, I don't want you to tell me the name or sex or any of the other questions I ask you about this person, but I want you to tell me whether you recall it. Do you recall the name of the person who admitted you to your observation point?

A. Yes, sir.

Q. You do. If you recall the name, I assume you recall the sex.

A. yes, sir.

Q. So if you saw that person again, you'd be able to identify that person; is that correct?

A. Yes, sir.

THE COURT: That's all I really wanted to know. Okay. Thank you, Officer.

(Witness excused.)

THE COURT: All right. What I would suggest that you do is this. If either of you, I'm going to look at some things myself tonight although I really think it's just a question of analogy here. But I would urge the



District Attorney to read Carter Pritchett and any counsel that wants to bring in any other applicable law that they think is relevant to this particular issue would be appropriate. Now, of course, there are some very intricate logistics that would have to be worked out if the Court was going to consider any type of in camera proceeding. The initial inquiry that arises is who would determine whether or not that person is available. It would seem to me that if I was, for the sake of discussion, if I was to say that I would be willing to conduct an in camera proceeding to determine if this person could be located to ascertain what that evidence is, that someone ought to have to make a determination as to whether that person is there. Certainly, it would seem to me that the person who I would have to do that is I would have to direct the District Attorney as an officer of the court to have his people make the appropriate inquiries to determine whether that person is there and then to report back. Does either counsel have any suggestion as to how that could be done differently?

MR. GAY: Yes, sir.

MR. SAGOT: I was going to say I agree with Your Honor conceptually. I think the only contact that the District Attorney would have in terms of that individual would be through the officer who just testified, who is exactly the person whose credibility is in question. That's the part that bothers me about that.

THE COURT: Well, there's certain things that can be done in that regard. I could ask that the name be revealed to me before any inquiries are made. That's why I asked the question.

MR. GAY: Judge, as long as proper safeguards were taken to avoid the moral hazard that exists given

the attack on the officer's credibility. If protection is given to that issue, I certainly have no objection to any way that would be reasonable.

THE COURT: I would invite all of you to think about this over the evening and we'll resolve it tomorrow morning.

MR. SAGOT: Is it fair to assume that Your Honor will be hearing no further testimony on this matter today?

THE COURT: That's correct.

MR. SAGOT: With the Court's permission, I have a conference scheduled at 9:30 tomorrow morning with Judge Kline with six other attorneys and it's a matter to be tried next week and it shouldn't take more than a half an hour.

THE COURT: Well, I mean, I'll call him myself. But I mean, you know, when we have a case listed here in the middle of the trial, I don't see how we could possibly do that.

MR. SAGOT: I understand. It's no fault of Your Honor. It was actually listed yesterday.

THE COURT: Mr. Clark, you know what we could do? We have enough deferreds tomorrow that if our District Attorney comes here tomorrow at 9:30, if Mr. Sagot comes here at ten that will be all right. So tell Judge Kline that I specifically excused you until ten o'clock.

MR. SAGOT: That should be fine. I can't imagine that it would last more than a half an hour.



THE COURT: I'd ask our District Attorney to be here at 9:30 and for you to be here at ten.

MR. SAGOT: Thank you, Your Honor.

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(Hearing recessed.)

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IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

- - -

COMMONWEALTH :
vs. :
EDWIN LABRON : No. 9009-2318
-and-
RICHARD RAMOS : No. 9009-2300
-and-
LUIS LAJARA : No. 9009-2314

- - -

Courtroom 254 City Hall
Philadelphia, Pennsylvania
Thursday, November 21, 1991

- - -

BEFORE: HONORABLE G. CRAIG LORD, J.

- - -

APPEARANCES:

GINO MECOLI, ESQ.
Assistant District Attorney
Counsel for the Commonwealth

VINCENT CORRIGAN, ESQ.
Defender Association
Counsel for Defendant Labron

ALLAN SAGOT, ESQ.
Counsel for Defendant Ramos

ANDREW GAY, ESQ.
Counsel for Defendant Lajara

- - -

**PRETRIAL MOTIONS**
**(VOLUME II)**



I N D E X

COMMONWEALTH'S EVIDENCE


| | DR. | CR. |
|---|---|---|
| Officer Salvatore Scarpato | [App. 194] | [App. 197] |
| | RDR. | |
| | [App. 206] | |
| Officer Kenneth Adams | DR. | |
| | [App. 208] | |
| Officer Gerald Nimmo | RDR. | RCR. |
| | [App. 227] | [App. 212] |


- - -

E X H I B I T S


| NO. | | IDENT. |
|---|---|---|
| D-3 | Property Receipt | [App. 201] |
| D-4 | Notes of testimony of preliminary hearing | [App. 227] |


- - -

PROCEEDINGS.

THE COURT: Mr. Clark, are we ready to proceed?

COURT CRIER: I am, Judge.

THE COURT: All right. I've advised counsel that the way I would wish to proceed this morning is to have the Commonwealth present the remainder of its testimony. It's my understanding that the defense may wish to recall Officer Nimmo. I will consider that once the Commonwealth has concluded their testimony on the motion. And I will also hear any argument and make any, hear any case law that either the Commonwealth or defense wishes to present on the issue raised yesterday as to whether the defense is entitled to learn the identity of the person who admitted the officer to the confidential location.

MR. GAY: Yes, sir. There's been some misunderstanding. The defense filed, Mr. Lajara filed a motion to suppress physical evidence in this case and I'm proceeding on all the grounds that were raised in that motion, in case there's been some misunderstanding.

THE COURT: Well, you did articulate --

MR. GAY: Yes, sir, with respect to the search of Mr. Lajara's person. And also I at this time, to the extent that it may not have been done, move to raise the issue of the search of the Lincoln and particularly the absence of a search and seizure warrant.

THE COURT: Basically, what I heard yesterday is that there was a challenge to the recovery of the physical evidence from wherever it was recovered.



MR. GAY: Yes sir.

THE COURT: So that's the way I viewed the motion.

MR. GAY: Yes, sir.

THE COURT: I'll continue the sequestration order. Who would be the Commonwealth's next witness?

MR. GAY: May it please the Court, at this time the defense moves to recall Officer Nimmo as of further cross-examination.

MR. MECOLI: Your Honor, I'd only ask if they're going to call him, that they call him as their witness.

THE COURT: I'll let you call him as part of your case as of cross.

MR. SAGOT: Very good.

THE COURT: When it comes to your case. I mean, does the order really matter?

MR. GAY: No, sir. It really doesn't matter, I imagine.

THE COURT: As long as you can cross examine him, it doesn't make any difference.

MR. GAY: Well, Judge, the problem with it is, it will be cross-examination purely for the purpose of impeachment and I think properly it should be that we

would be allowed to recall him as of cross-examination at this time.

THE COURT: Let's do this. Let's hear from the other witnesses. Then we'll ask Officer Nimmo to come back up and I'll hear your questions.

MR. GAY: Yes, sir. Thank you.

THE COURT: Who's your next witness?

MR. MECOLI: Excuse me, Your Honor. I would call Officer Scarpato. Before we go further, I'd ask when Officer Nimmo gets back on, I'd ask the Court to read the notes that I was just handed this morning.

COURT CRIER: State your full name. Spell your last name. Give your badge number, district or division.

THE WITNESS: Police Officer Salvatore Scarpato. S-C-A-R-P-A-T-O. Badge number 3982, Philadelphia Police Department, Narcotics Unit.

OFFICER SALVATORE SCARPATO, after having been duly sworn, was examined and testified as follows. . .

DIRECT EXAMINATION

BY MR. MECOLI:

Q. Officer, directing your attention to August twenty-fourth, 1990, at approximately 2:20 p.m. in the vicinity of the 900 block of West Auburn Street in Philadelphia.



Did your come to be at that location at that date and time?

A. Yes.

Q. Could you tell us what you did at that date, time and location that brings you to court here today.

A. If Your Honor please, acting on information received, I went to the 900 block of Auburn Street. I went directly to a 1977 Lincoln painted blue. It was parked on the south side of the street on the pavement. I forced open the trunk of that vehicle.

Q. How did you do that, Officer?

A. There was a toolbox on the pavement near the car and I took a large screwdriver from that box and forced open the lock of the trunk and then the trunk opened.

MR. GAY: May the record show that the witness during the course of his last two sentences was smiling.

THE COURT: I'll take note of it for whatever it's worth.

MR. SAGOT: This is our first notice of that toolbox, Your Honor. Never mind, Your Honor.

THE COURT: All right. Please proceed.

BY MR. MECOLI:

Q. Did you seize anything from that trunk, Officer?

A. Yes, I did. I recovered from the trunk two plastic bags which contained a white substance and one plastic sandwich baggie which contained five clear plastic packets. Each packet contained a white substance. I placed those items --

THE COURT: How many packets were within the sandwich baggie?

THE WITNESS: Five, Your Honor. I placed those items on property receipt number 291304.

BY MR. MECOLI:

Q. Now, from where in the trunk did you recover these items?

A. They were on the right side of the trunk.

Q. Did you have occasion to look anywhere else in the vehicle?

A. Yes, I did.

Q. Where else did you look?

A. I looked in the interior of the vehicle also, and I recovered fifty dollars in United States currency from under the rear seat.

Q. Now, Officer, what was it that brought you to this vehicle?

A. Information from Officer Nimmo.

Q. What was that information?



A. What he had observed.

Q. What did he tell you?

A. Well, he wasn't talking directly to me. He was relaying this information to a supervisor that was in my vehicle. And I don't remember his exact words, something about drug transaction and they just put it in the trunk and a blue Toyota had left. And that's when we all went to the location.

MR. MECOLI: I have nothing further.

MR. SAGOT: May I inquire, Your Honor?

THE COURT: Yes.

CROSS EXAMINATION

BY MR. SAGOT:

Q. Were you able to observe that location prior to the time you went to the Lincoln to open the trunk or were you out of view of what had ever gone down prior to that time?

A. Prior, I was out of view.

Q. And this information you received from Officer Nimmo, was it by radio?

A. Yes.

Q. On that particular detail, you were part of the surveillance detail?

A. I was part of the backup unit.

Q. The backup unit for the surveillance detail.

A. That's correct.

Q. How many brother officers were with you in that backup unit?

A. In my vehicle, there was three other officers. And there were two more vehicles. I'm not sure how many officers were in that.

Q. Had you met to discuss the game plan, if you will, prior to setting up the surveillance?

MR. MECOLI: Objection, beyond the scope.

THE COURT: Overruled.

THE WITNESS: We had talked about it up in headquarters prior to going out.

BY MR. SAGOT:

Q. And how many people were part of that group that talked at headquarters and ultimately went out to the field?

A. I would say eight or nine.

Q. What time did you arrive? How far were you from the 900 block of Auburn Street?

THE COURT: When?

MR. SAGOT: At the time that the surveillance had been set up.



THE WITNESS: We were approximately two blocks south of that location.

BY MR. SAGOT:

Q. What time did you arrive two blocks south of that location that day?

A. I don't recall what time we arrived.

Q. Was it a long period of time or a short period of time prior to popping the trunk on the Lincoln?

THE COURT: Prior to what?

BY MR. SAGOT:

Q. Popping the trunk on the Lincoln.

A. It was not a long period of time from when we initially got to our backup position to when we went to Auburn Street. I don't remember exactly how much time had elapsed, but it was not a long period of time.

Q. When you say not a long period of time, approximately how much time are you referring to?

A. It could have been twenty minutes to a half hour, but I'm not certain.

MR. SAGOT: Thank you very much. I have nothing further of this witness.

THE COURT: All right. Mr. Gay, anything for this witness?

MR. GAY: Yes.

BY MR. GAY:

Q. Officer, during the course of your searching the trunk of the Lincoln, did you find a plastic bag that was not clear?

A. The items that I mentioned were in a plastic bag. I can't recall what color it was. It might have been white but I'm not certain about that, counsel.

Q. You just don't remember; is that right?

A. I don't remember.

Q. All right. And all things are possible when you say it might have been; is that it?

A. It might have been, yes.

Q. Did you surrender to someone all of the items that you found in the trunk of the Lincoln?

A. What do you mean surrender?

Q. Did you give them over to someone?

A. No. I held on to them.

Q. Did you prepare the property receipt yourself that ultimately scheduled the items that you found in the Lincoln?

A. Yes, sir.

MR GAY: And may I have just a moment, Your Honor, to approach the witness?



THE COURT: Yes.

MR. GAY: And may we have this marked, please, defense exhibit next in order.

THE COURT: We were at D-3.

COURT CRIER: I believe so, Judge. D-3.

MR. SAGOT: Were the notes D-3, Your Honor?

BY MR. GAY:

Q. Officer Scarpato, would you please examine D-3 and first tell me by whom it was prepared.

A. This was prepared by me.

Q. Does D-3 schedule all of the items that were found in the trunk of the Lincoln?

A. Yes.

Q. Having read D-3, is your recollection now refreshed as to whether or not there were any plastic bags in the trunk of the Lincoln that were not clear?

MR. MECOLI: I object, Your Honor. Looking at what D-3 is, I don't think it indicates that.

THE COURT: I'll overrule the objection.

THE WITNESS: Would you repeat the question, counselor?

BY MR. GAY:

Q. Having now read D-3, is your recollection refreshed as to whether there were any plastic bags in the trunk of the Lincoln that were not clear plastic bags?

A. I don't remember any plastic bags that were not clear.

Q. Very well, sir.

THE COURT: Any objection to my looking at the --

MR. GAY: Absolutely not.

THE COURT: From the Commonwealth?

MR. MECOLI: No, Your Honor.

THE COURT: Thank you.

BY MR. GAY:

Q. Now, the next question, Officer. Does D-3 adequately and fully describe the items that were shown thereon?

A. Yes, it describes them.

MR. GAY: Yes, sir. Thank you. I have no further questions.

THE COURT: Mr. Corrigan, any questions?

MR. CORRIGAN: Yes, Judge.

BY MR. CORRIGAN:



Q. Officer Scarpato, when you arrived at the 900 block of West Auburn Street you said there were a total of, including yourself, a total of four officers in your car; is that right?

A. I believe so, yes.

Q. And were you the only car that arrived on the scene of the 900 block of West Auburn Street or did another car come along with you or meet you there?

A. I believe another car went to that location. Not the same direction we went in.

Q. Right.

A. But I'm not certain about that.

Q. So you're certain that there were at least four police officers on this location. There could have been as many as six or seven.

A. That's possible, yes, counselor.

Q. And now, were you the first to arrive or did the other car arrive first?

A. We were the first ones to go up the 900 block.

Q. And when you did so, two individuals, a Mr. Labron and a Mr. Santiago, were taken into custody; is that right?

A. Yes, they were.

Q. And that would be before you searched the Lincoln, correct?

A. Well, I didn't actually observe them taken into custody.

Q. Now, when you arrived in the block, did you remember where the blue Toyota was located?

A. I don't remember any blue Toyota on that block.

Q. Now, you say that when you arrived on the 900 block of West Auburn, you yourself went directly to the Lincoln. That was your assignment; is that right?

A. That's correct.

Q. And there were two individuals arrested but they were not arrested by you and you weren't paying particular attention to where they were; is that right?

A. That's correct.

Q. So now, when you arrived on the scene did you force the trunk of the Lincoln immediately or were you there maybe two minutes, three minutes before you did that?

A. I met everybody there a couple of minutes.

Q. And now, you did not recover a key to the trunk of that Lincoln, did you sir?

A. No, I did not.

Q. Now, was all the evidence that was recovered in the 900 block of West Auburn given to you or did other officers who recovered other evidence keep that evidence themselves until they were placed on property receipts?



A. I wouldn't know. I just had custody from what I recovered from the vehicle. I was not given any other evidence.

Q. And you recovered from the vehicle the cocaine from the trunk and nothing else; is that right?

A. Fifty dollars from inside the vehicle, which was under the rear seat.

Q. And now, were you the only officer searching the vehicle, or did other officers assist you in searching the vehicle?

A. There was another officer there, I don't recall who, looking inside the vehicle as I was.

Q. And you don't recall at this time whether that other officer or yourself found the money inside the vehicle.

A. No. I found the money.

Q. Now, so you were not paying attention, as it were, or present in the sense of observing any search which might have been taking place of the two individuals who were arrested in the 900 block of West Auburn.

A. No. I wasn't involved with that.

Q. So you wouldn't know whether or not any drugs or money or anything like that was recovered from them; is that right?

A. No, I wouldn't know.

MR. GAY: May we have just a moment?

THE COURT: Yes.

BY MR. CORRIGAN:

Q. Now, other than the two individuals that were placed into custody by police officers, were you aware of any other people in the 900 block of West Auburn at the time that you arrived?

A. I really wasn't paying any attention.

Q. And now, prior to this operation even beginning, you had information which specifically pointed you to this Lincoln or you were just, or you don't know?

A. Do you mean prior to the operation?

Q. Right.

A. I had no knowledge of any vehicle prior to going out there.

MR. CORRIGAN: I have no further questions.

THE COURT: Anything further?

MR. MECOLI: Your Honor, very briefly.

REDIRECT EXAMINATION

BY MR. MECOLI:

Q. On that Lincoln, did you notice if it had a license tag?

A. Yes, it did.



Q. Did you see that license tag?

A. Yes, I did.

Q. Do you remember what that license tag is today?

A. SNE349.

Q. What state was that?

A. Pennsylvania.

MR. MECOLI: I have nothing further.

THE COURT: Any questions?

MR. GAY: No.

THE COURT: All right. You can step down, Officer. Thank you.

THE WITNESS: Thank you, Your Honor.

(Witness excused.)

THE COURT: Anything further from the Commonwealth?

MR. MECOLI: Your Honor, we lastly would call Officer Adams.

THE COURT: Officer Adams, Sylvester.

COURT CRIER: Place your right hand on the Bible. State your full name. Spell your last name. Give your badge number, district for the record, please.

THE WITNESS: Officer Kenneth Adams. A-D-A-M-S. 1101, First District.

OFFICER KENNETH ADAMS, after having been duly affirmed, was examined and testified as follows. . .

DIRECT EXAMINATION

BY MR. MECOLI:

Q. Officer, I want to direct your attention to August twenty-fourth, 1990, in the 500 block of West Lehigh Avenue, approximately 2:20 p.m. Were you at that location on that date and time?

A. Yes, I was.

Q. At that date, time and location, did you come into contact with anyone you see in court here today?

A. The gentleman at the defense table.

Q. Could you point to who you mean, sir?

A. I haven't seen him in a year, but this gentleman in the black shirt.

Q. Indicating for the record Defendant Lajara.

A. And this gentleman here.

THE COURT: Which gentleman?

THE WITNESS: In the flower, next to him.



MR. SAGOT: This one here? Indicating Mr. Ramos, Your Honor.

BY MR. MECOLI:

Q. Now, how did you come into contact with those two defendants at that date, time and location?

A. I received radio information from Officer Nimmo that two gentlemen that were in a blue Toyota were heading in our direction and he would like those gentlemen stopped in conjunction of his investigation that was going on a couple of blocks away.

Q. When you say stopped, what do you mean?

A. Detained, arrested.

Q. Where did you find those gentlemen?

A. In the 500 block of West Lehigh.

Q. How did you stop them?

A. I believe there was another car besides me, Officer Arvello, and one unmarked car. I believe we had another unmarked car with us. We boxed them in, got out of the car, identified ourselves as police officers, took those gentlemen out of the car and brought them back to the location that Officer Nimmo wanted them brought back to.

Q. And what happened at that point?

A. They were identified by Officer Nimmo and they were placed under arrest?

Q. Now, what car did you take them out of?

A. A blue Toyota with a Pennsylvania license plate of XZB583.

Q. Did you, did you or your partner search either of these individuals?

A. We patted the gentlemen down for weapons but they weren't searched until after they were taken back inside the Narcotics Unit.

Q. Did you recover anything from them?

MR. SAGOT: Objection. He didn't say he searched them.

THE COURT: Did you search them inside of Narcotics?

THE WITNESS: No, I didn't.

THE COURT: All right. I'll sustain the objection.

MR. MECOLI: Just one moment, Your Honor. I have nothing further.

THE COURT: All right. Any questions, Mr. Sagot.

MR. SAGOT: I have no questions.

THE COURT: Mr. Gay?

MR. GAY: No sir. I have nothing.



MR. CORRIGAN: No, Your Honor.

THE COURT: All right. You may step down, Officer. Thank you.

(Witness excused.)

THE COURT: Is there anything further that the Commonwealth wishes to present on the motion?

MR. MECOLI: I believe we're recalling Officer Nimmo and that would be it.

THE COURT: Yeah. Okay. Let's have Officer Nimmo come back in, Sylvester.

MR. MECOLI: Your Honor, I would ask for that moment to finish the reading of the notes that I was promised this morning.

THE COURT: Go ahead.

MR. SAGOT: Judge, I'd object to that at this point. This is cross examination on prior inconsistent statements. And I think that --

THE COURT: Well, I'm allowing you to recall the officer so I'm going to give him the opportunity to review the notes.

MR. SAGOT: Very well, Your Honor. I withdraw that objection.

THE COURT: I'm going to give the Commonwealth a few moments to look something over.

COURT CRIER: In the interim, Officer, state your name for the record.

THE WITNESS: It's Officer Gerald Nimmo, 9638, Philadelphia Police Narcotics Unit. N-I-M-M-O.

COURT CRIER: And I will remind you, you're still under oath, Officer.

MR. GAY: Your Honor, may I have a moment with counsel? Maybe we could give him some direction as to where we want to go.

MR. MECOLI: Very good, Your Honor. Thank you. I'd just ask to have them again if there's a need for redirect. Thank you.

THE COURT: Yes. Who's going to ask the questions? Who wishes to proceed with the questioning? Mr. Corrigan? All right.

RECROSS EXAMINATION

BY MR. CORRIGAN:

Q. Now, Officer Nimmo, there was some discussion yesterday of a gentleman by the name of Raphael Melendez, who was allegedly present at the scene and was not arrested at that time. Now, it transpired that he was in fact arrested at some point; is that correct?

A. Yes, sir.

Q. And on March the sixth of this year, you testified at a preliminary hearing before the Honorable Judge DeLeon with reference to Mr. Melendez and these events; is that right?



A. I testified. I don't remember what the date was. Yes.

Q. Now, at that time, were you asked the following questions? I apologize to counsel and the Court that I only have one copy of these notes. You were asked specifically, question: Now, where in here did you find the 49? Referring you back to the 49, did you adopt everything that's in this police 49? Who was it prepared by?

Answer: Myself.

Question: And as far as you just read it.

Answer: Yes, correct.

Question: You just reviewed it at the bar of the court. To your knowledge, everything that's in the police 49 completely --

Mr. Roberts, the District Attorney: I would object, Your Honor.

MR. MECOLI: Objection, Your Honor.

THE COURT: Let him finish.

MR. CORRIGAN: He didn't prepare it.

The Court: He said he prepared it. Objection overruled. You can answer.

And it goes on to answer to a question: It is a summary of the situation.

Question: Are there any errors in there that you just read over that you can tell me now is a mistake?

Answer: The the only thing I looked over was dates, times, names and types of vehicles.

Question: And you also looked over what was confiscated from whom.

Yes, sir.

BY MR. CORRIGAN:

Q. Now, at that time, you didn't state to counsel there were any errors with respect to the dates, times, names of persons and confiscated items; is that right?

A. Did I state that there was errors?

Q. Yes.

A. I don't recall, no, sir.

Q. And you did have an opportunity to review the 49 and did in fact review it, did you not?

A. Back in March?

Q. Yes.

A. Yes, sir.

Q. Now, referring you, if I might, to page thirty of the notes of testimony. Actually, referring you to page five of the notes of testimony. You were asked the following question by the District Attorney: Please tell



His Honor what exactly occurred on that date that brings you to court.

Your answer at that time was: If Your Honor please, on that date and time while assigned to a narcotics unit working plainclothes, I conducted a surveillance of the 900 block of West Auburn Street. At approximately two p.m. I observed both defendants along with two other hispanic males in the 900 block of West Auburn Street.

Now, you then went on to describe the males present and your answer: Two of the males, I believe one was Santiago, the other one was Labaron, these two males were being approached by numerous black and hispanic males. They accepted US currency and were passing out white packets, white plastic packets. They took out clear plastic baggies. This went on for several minutes. The defendant then comes over, that would be referring to Mr. Melendez, talked to the two males, Labaron and Santiago, went over to a blue Lincoln automobile which was parked on the south side of Auburn Street. He opened the trunk of the car with a key. He went to the right side, the right rear of the car, and retrieved from there another plastic baggie and gave it to the males Santiago and Labaron baggies from that. He stayed for a few minutes. The transactions were still going on.

Approximately ten minutes, the defendant went back to the older hispanic male, Santiago, and gave him the keys to the Lincoln. The defendant then went into a Ford station wagon and went it would be east on Auburn and south on 9th Street. Approximately ten minutes after he left, the males are still selling packets on the highway. A blue Toyota pulled up with two

other hispanics. And that would be the end of your answer.

Now, do you recall giving that answer in response to Mr. Roberts' question on that day, sir?

A. I remember the incident. I don't remember testifying, no, sir.

Q. Officer, do you know if there's any reason why today you have difficulty recalling testifying in March and yesterday you had difficulty recalling testifying in I believe October of 1990 but yet you clearly remember an incident that took place in August of 1990?

MR. MECOLI: Objection.

THE COURT: Overruled.

THE WITNESS: I don't have difficulty remembering testifying. I don't have difficulty with the incident. I have difficulty if you're asking me what specific questions, specific answers verbatin.

MR. SAGOT: I just want to apologize to the Court. If you'll indulge me for just one minute.

THE COURT: Yeah.

MR. SAGOT: Thank you, sir.

BY MR. CORRIGAN:

Q. Now, finally, I just want to direct your attention to page twenty-one of these notes of testimony when you were asked the following question: How long was your surveillance on that date, on August twenty-fourth?



And: Approximately two o'clock.

Question: Two o'clock? And when was the arrest made of the other individual?

The other male?

Yes.

I believe 2:20.

Question: So for twenty minutes, for the twenty minutes that you observed the Lincoln Continental, was my client, again referring to Mr. Melendez, there for the entire twenty minutes?

Answer: No sir. He was there for about ten, maybe fifteen minutes.

Now, do you recall those questions and those answers, sir?

A. I remember the incident, yes, sir. The questions and answers, I remember testifying. I believe I testified to that.

Q. Okay. And also, I direct your attention to page four of the notes of testimony. The following question was asked of you by the District Attorney: Directing your attention, Officer, to the date of August twenty-fourth, 1990, at approximately two o'clock p.m. in the vicinity of 900 West Auburn Street in Philadelphia. Did you come into contact with anyone you see here in the courtroom today?

Your answer to that question was yes, sir.

Now, do you recall giving that answer in response to that question?

A. Specific question? Yeah, I believe I testified to that, yeah.

Q. Well, now, in this notes, in these notes of testimony, several times you referred to the surveillance as always referring to the time of two p.m. You also reviewed the 49, which again contained the information that the surveillance began at two p.m. Now, having heard all of that, sir, are you still saying that the surveillance started at actually around 12:15 p.m. or did it begin at two p.m.?

A. I'm still saying it's a summary of the events and the surveillance started prior to it.

THE COURT: Prior to what?

THE WITNESS: Prior to two o'clock. About 12:15.

MR. CORRIGAN: Your Honor, I have no more questions. Apparently Mr. Sagot does.

MR. SAGOT: Just a few, Your Honor, if I could.

BY MR. SAGOT:

Q. During the course of direct examination and cross-examination, you testified that the distance that you observed --

A. Which time, counselor?



THE COURT: Well, why don't you clarify it.

BY MR. SAGOT:

Q. During the course of your testimony, sir, you were asked in the courtroom --

THE COURT: Here?

MR. SAGOT: Here.

BY MR. SAGOT:

Q. At what distances you were able to observe the various activities that you described to us. You claim or you stated and testified at that time that it was anywhere from fifty to a hundred and fifty feet in distance, if I recall your testimony; is that correct?

A. No, sir. It was closer at times.

Q. I'm sorry. Closer?

A. It was closer at times.

Q. But it was certainly no greater than a hundred and fifty feet; is that right?

A. That would be when I first observed them, yes, sir.

Q. At any time was it greater than that?

A. No, sir.

Q. Now, referring back to these notes of testimony of the Melendez hearing that occurred on March sixth at page twenty-eight. The following question and answers

were asked and answered by you. By Mr. Popper, I believe. You could see. Excuse me. This was you testifying. When the trunk was opened I could see into the trunk, Your Honor.

Mr. Popper: Sir, you were behind looking at the trunk; is that correct?

Answer: I could see him in the trunk and he opened the trunk and from less than two hundred feet away.

You were using binoculars, I assume.

Answer: No, sir.

With your naked eye from two hundred feet away you could see what he was doing inside the car?

Answer: I was less than three hundred feet. Yes, I could.

Do you remember testifying at the preliminary hearing and providing those answers to the Court?

A. I don't recall three hundred feet. Two hundred feet I may have said because I was well within two hundred feet.

Q. Okay. The other answer was, I was less than three hundred feet. Do you recall that answer?

A. That I do not recall.

Q. If I would show you these notes of testimony and ask you to review the last six lines. May I approach the witness, Your Honor? Would you please do so and then



I will ask you if that refreshes your recollection as to your testimony on that day at the Melendez preliminary hearing.

A. From the point where I could see him in the trunk, that question?

Q. Yeah, right down there. Yeah.

A. All right.

Q. Does that refresh your recollection? Have you reviewed that, Officer?

A. It's the same questions you asked me, yes, sir.

Q. Right. And does, do the notes of testimony refresh your recollection as to the maximum distances that you observed this activity?

A. It was well within two hundred feet. It was within a hundred and fifty feet. It was well within that.

Q. It was well within a hundred and fifty feet or two hundred feet?

A. Yes, sir.

Q. Which one, sir?

A. Depending on what time you're saying.

Q. All right. Now, in addition to that, the period of time that you observed, you've testified earlier that you observed the defendants Labron and Santiago retail selling narcotics on the street; is that correct?

A. Yes, sir.

Q. And you also testified that you observed that for about an hour and a half and that you saw approximately fifty two-bag buys during that period of time, if I recall your testimony correctly.

A. It was a guesstimate. Yes, sir.

Q. But that was your guesstimate at the time that you testified in this case.

A. Yes, sir.

THE COURT: I heard the testimony.

BY MR. SAGOT:

Q. Now, sir, at page thirty of the notes in the Melendez hearing, the following questions and answers took place at page thirty; And did you see what Labron and Santiago did with what they received?

Yes, sir. They sold them on the street to hispanic and black males.

And approximately how long did that take?

Answer: Ten minutes at most.

Do you recall testifying in that fashion at the Melendez hearing?

A. I believe. I believe. You know, I remember testifying. Yes, sir. I believe I mentioned that.



Q. Do you recall mentioning that this retail activity took place for a period of ten minutes?

A. I don't know if I was referring to ten minutes prior to him leaving or at what point you're talking about. I don't know.

MR SAGOT: I have no further questions of this witness.

THE COURT: Mr. Gay, anything?

MR. GAY: Yes, sir, I do.

BY MR. GAY:

Q. Officer, to be clear about one thing. The Toyota was parked ahead of the Lincoln and I take it, then, about a car length or two away from the intersection of Auburn and 9th Street; is that approximately correct?

A. What I recall, yes, sir.

Q. Now, I just want to know. I want to put these questions to you and I want you to tell me whether or not there's anything about the question as put to you now that you do not understand.

MR. MECOLI: Objection.

THE COURT: Overruled.

BY MR. GAY:

Q. Question: So you were behind looking at the trunk; is that correct?

Do you understand that question?

A. I understand that question.

Q. Is there anything unclear about it that you can tell the Court at this time?

A. It's not asking me at what time am I behind it.

Q. Well, let me ask you this. At any time that you were behind the Lincoln looking at it, did the Lincoln move?

A. The Lincoln never moved.

Q. Did you move from where your point of observation was?

A. Yes, sir.

Q. And where did you move to from one place to another place?

A. I was on the same level and I would move within maybe fifteen to twenty feet.

Q. Okay, So at most there was a difference of maybe fifteen feet that you moved from one window to another window, let us say, in the same room perhaps, wherever that was.

A. Yes, sir.

Q. But not a substantial distance more than fifteen or twenty feet.

A. Correct, sir.



Q. Okay. Now, the next question. See if there's anything about this question that you do not understand.

Question: And he opened the trunk and from less than two hundred feet away. You were using binoculars I assume.

Do you understand that question?

A. I understand English, yes, sir.

Q. Do you understand the following question?

With your naked eye from two hundred feet away, you could see what he was doing inside the car.

Do you understand that question?

MR. MECOLI: I'd object to that, Your Honor. That misstates --

THE COURT: Overruled.

MR. MECOLI: That's the defense testifying.

MR GAY: I just want to know --

THE COURT: Mr. Gay, I overruled the objection. You can answer the question.

THE WITNESS: Do I understand the question?

MR. GAY: Yes.

THE WITNESS: I understand the question.

BY MR. GAY:



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Q. Question. Do you understand this question?

Did you see anything else in the trunk of that car?

A. I understand the question.

Q. I want you to see if there's anything that you do not understand about this question.

MR. MECOLI: Your Honor, could we have the answer to the last one?

MR. GAY: I'm not asking him about the answer, Judge.

THE COURT: Mr. Gay, it's overruled.

MR. GAY: Yes, sir.

BY MR. GAY:

Q. Is there anything about the following question that you do not understand?

Question: How far were you from the blue Lincoln Continental?

A. I understand it.

MR. GAY: Very well, sir. Thank you. I have no more questions.

THE COURT: Anything further?

MR. SAGOT: Nothing, Your Honor?



THE COURT: Anything for the Commonwealth of the officer?

MR. MECOLI: Could I have the notes, please?

MR. GAY: Sure. Twenty-one, twenty-eight, twenty.

REDIRECT EXAMINATION

BY MR. MECOLI:

Q. Officer, do you recall exactly what your testimony was?

MR. GAY: I can't hear the District Attorney. I'm in a dead spot.

BY MR. MECOLI:

Q. Do you recall exactly what your testimony was on March sixth, 1991?

A. No, sir.

Q. Showing you what's been marked, is this D-4?

THE COURT: We really haven't marked it yet. It's not been marked.

COURT CRIER: C-4?

MP. MECOLI: I think it's D-4, actually.

MR. SAGOT: D-4, I believe.

BY MR. MECOLI:

Q. Showing you what's been marked D-4, specifically page five. Can you read that, please?

A. Out loud, counselor?

Q. If you like.

A. I'm sorry, counselor?

THE COURT: Do you want him to read it out loud or read it to himself?

MR. MECOLI: Read it out loud if he likes.

THE WITNESS: Answer: If Your Honor pleases, on that date and time while assigned to the Narcotics Unit working plainclothes I conducted a surveillance of the 900 block of West Auburn Street.

MR. GAY: I object to that, Your Honor.

MR. CORRIGAN: This is all repetitive.

MR. GAY: And I demand an offer of proof.

THE COURT: Maybe I'm missing something. You were permitted to question him on certain aspects of his testimony.

MR. GAY: Prior inconsistent statements and whether or not he understood the question.

THE COURT: I understand. I assume counsel is attempting to rehabilitate that with prior consistent statements. Now, how I can rule on whether they're consistent before I hear what they are is something I've always wondered about.



MR. GAY: Very well, Your Honor.

THE COURT: Go ahead, Officer.

THE WITNESS: I conducted a surveillance of the 900 block of West Auburn Street. At approximately two p.m. I observed both defendants along with two other hispanic males in 900 block of West Auburn, two other males I believe to be Santiago and the other one was Labaron, and these two males were being approached by numerous black and hispanic males and they were accepting US currency and passing out white packets, white plastic packets they took out of the clear plastic baggie. They went, that went on for several minutes. Defendant then came out. The defendant then came out, talked to the other two males, Labaron and Santiago, went over to the blue Lincoln automobile that was parked in the south side of Auburn Street. He opened the trunk of the car with a key. He went to the right side, the right rear of the car and retrieved from there a plastic baggie and gave the other two males, Santiago and Labaron, baggies from that. He stayed there a few minutes. The transactions were still going on.

Approximately ten minutes, the defendant went up to the older hispanic male, Santiago, and gave him keys to the Lincoln. Defendant went on. Excuse me. The defendant then went into. Go to another page?

MR. MECOLI: Yes.

MR. SAGOT: Well, Your Honor I'd object to reading the notes of testimony into the record. Number two, I think also, it's inappropriate because the District Attorney is now impeaching his own witness.

THE COURT: You say impeaching. I think he's trying to rehabilitate his own witness.

MR. SAGOT: Well, I think he's using another prior inconsistent statement.

THE COURT: Whether it's consistent or inconsistent is up to the Court to determine.

MR. SAGOT: Without question, Your Honor.

THE COURT: So I'm going to let him continue. I mean, I'm not going to sit here and let him read the whole thing, but if he wants to continue briefly, go ahead.

MR. SAGOT: I think the notes have been marked as an exhibit, Your Honor.

THE COURT: Do you want me to read the notes?

MR. MECOLI: Your Honor, that would be fine with the Commonwealth.

THE COURT: How about I read the notes. Is that acceptable?

MR. GAY: Your Honor, I certainly have no objection to the Court reading the notes. They certainly go beyond the issue of impeachment, though.

THE COURT: All right. I can read them as well as the officer. Why don't you hand up the notes and I'll read them.



MR. CORRIGAN: Your Honor, the notes of testimony as copied do reflect two preliminary hearings.

MR. MECOLI: For persons not even here.

MR. CORRIGAN: The section in question would be page one through page thirty-three.

THE COURT: One to thirty-three. Is that agreed, Mr. Mecoli?

MR. MECOLI: I believe so, Your Honor.

THE COURT: Why don't you just check on that and see. Save ourselves a lot of time here.

MR. MECOLI: Very good. One to thirty-three.

THE COURT: All right. Now, what we'll do is, I assume, now, with that, Mr. Mecoli, I assume you wish, I don't think you have any exhibits, do you?

MR. MECOLI: No, I don't, Your Honor.

THE COURT: Are you resting on the motion?

MR. MECOLI: Yeah, I would rest at this point.

THE COURT: All right. Now, do you wish to move in your exhibits?

MR GAY: I do at this time.

MR. SAGOT: Yes, Your Honor.

THE COURT: Any objection from the Commonwealth?

MR. MECOLI: No.

THE COURT: Now, here's the procedure that I think would be most efficient. At this point, we have the open issue of the, whether the Court should direct the Commonwealth to determine if the -- Officer, you can step down. Thank you. You should wait outside.

(Witness excused.)

THE COURT: Whether the Court should comply with your request that the Commonwealth be directed to produce the person who admitted the officer. However, the defense has rested; is that correct? With the exception. I mean, is the defense prepared to rest with the exception of the possible testimony of that witness and any additional items that may be opened up by that witness if the Court orders it?

MR. SAGOT: On behalf of the defendant Ramos, yes, Your Honor.

THE COURT: Mr. Gay?

MR. GAY: Yes, Your Honor.

THE COURT: And Mr. Corrigan?

MR. CORRIGAN: Yes, Your Honor.

THE COURT: Now, okay. I think there are some questions on the motion which could moot that issue.

MR. SAGOT: There's another question too, Your Honor.



THE COURT: Which is?

MR. SAGOT: Even without intellectualizing the issue, I think if the District Attorney spoke to his officer, his officer even at the Court's direction may not wish to give up that individual's identity.

THE COURT: Well, I must tell you, I have not in any way decided that issue.

MR. SAGOT: I'm saying regardless of Your Honor's decision. If he advises the Court that --

THE COURT: All right. But here's what I think I'd like to do at this time. Mr. Mecoli, you handed up the case and I want to give the citation to counsel so that we all have it, Commonwealth versus Dellagatti. Cite is 538 A.2d. It's 538 A.2d page 34, 1988 panel decision of the Superior Court.

MR. SAGOT: I apologize, Your Honor. 538 A.2d?

THE COURT: 34. And I've read it quickly and in that particular case, it is true that the Superior Court did not see the Carter applied to the disclosure of the informant in that particular situation.

Now, do you wish to advance anything else other than that case in response to their request to the Court that the officer identify the informant?

COURT CRIER: Counsel, before you proceed.

THE COURT: Thank you, Mr. Clark.

(A brief recess was taken.)

THE COURT: All right. Mr. Mecoli, do you have anything else you wish to add on that issue in the way of argument?

MR. MECOLI: Your Honor, there are other cases dealing with it and my research showed me what Your Honor's did. Commonwealth versus Carter is controlling in the instance of a witness but they all deal in these cases with eyewitnesses. Any case that deals with an informant or someone who is not a witness to the case has not been, there has not been a requirement for the Commonwealth to disclose in that instance.

THE COURT: When you say a witness in the case, you mean a witness to the transaction.

MR. MECOLI: Eyewitness to the crime. And as in Dellagatti, Your Honor, in which the person is a tool in terms of getting to the actual crime, that person has not been, the Commonwealth has not been obligated to disclose that person.

THE COURT: Well, is it fair to say that the issue that you would have the Court turn down Mr. Gay's request is on the basis that the evidence or the testimony which they would seek to produce is not as central to the process as was the eyewitness's testimony in Carter, something like that?

MR. MECOLI: Exactly, Your Honor. It's always been, from my reading, it's a balancing test. And when there is a person who in Carter, the person is any eyewitness, they're there, they're part of the scene in what goes on. But in every other case that I've been looking at, when the person is not an eyewitness, when they're not there, when they're an informant on a warrant --



THE COURT: Well, any eyewitness. An I witness to what? This person is an eyewitness to certain things that allegedly occurred. It's not that the person is not an eyewitness. It's a question. That's why I use the word centrality of it. They are clearly an eyewitness.

MR. MECOLI: Well, true. But in Dellagatti, Your Honor, the person that was the informant in that case --

THE COURT: Was an eyewitness also.

MR. MECOLI: Was an eyewitness to introducing the undercover officer to the defendant and could have been called for that purpose. The Court looked at that and figured that the government's privilege outweighed the defense need for disclosure.

THE COURT: All right. Now, do either counsel wish to draw my attention to anything additional on that score?

MR. GAY: Your Honor, I think that counsel is mincing words when he talks about an eyewitness. An eyewitness is someone who has firsthand knowledge. It's that simple. I don't think there's any question about that. And if you look at, you know, the Pritchett decision, I think that this is revealing. Moreover, even if the trooper's testimony did not establish that the informant was an eyewitness, it did establish that the informant was an active participant. You're talking about people who were there, who have relevant knowledge concerning when the officer entered the house. That's really the issue. And to that extent, they are eyewitnesses to material facts. Those facts are material to this motion and to the question of whether or not that officer is telling the truth. While it may not be as

important at this time, you know, given the impeachment material and given Officer Scarpato's testimony, it is still an issue unless the Court feels that it's not an issue any longer. In that in any event, if the Court so felt, I would not press the issue of the production of those witnesses as long as the defense's point has been made to this Court.

THE COURT: Well, I understand your point. Now, I want to raise one other item at this point with the District Attorney and that is this: That I question at this point whether the evidence that you introduced establishes that a warrant was not necessary to enter this vehicle.

MR. MECOLI: Your Honor, I have case law on that also, if I may present it.

THE COURT: What do you have on that?

MR. MECOLI: It's Commonwealth versus Jenkins, Your Honor. If I can have just a moment, I'll find it.

THE COURT: All right. Take your time and find it.

MR. MECOLI: If I could hand this up to the Court.

THE COURT: Sure. Mr. Clark?

MR. MECOLI: I had more time with this, Your Honor, so I have copies for the defense counsel.

THE COURT: Is there any other case law that you can give me?



MR. MECOLI: No, Your Honor.

THE COURT: Well, let me just say this. Jenkins is a 1991 Superior Court decision and as such, it would not overrule the Pennsylvania Supreme Court cases. I'd like to call your attention to several cases.

MR. MECOLI: Very good, Your Honor.

THE COURT: And also that of defense counsel. Commonwealth versus Rodriguez, which is at 585 Atlantic 2d 988'88, Pennsylvania Supreme Court 1991. Also Commonwealth versus Baker. Baker is 541 A.2d 1381, 1988 Pennsylvania Supreme Court case. And the reason I call these to your attention is because as I have read these other cases, without having read Jenkins, I don't think the Pennsylvania Supreme Court has yet said that as long as you have probable cause to believe that contraband is in a vehicle, there is an automatic right to search that vehicle without a warrant.

If you read Baker and you read Rodriguez, they talk about exigent circumstances. They talk about sudden encounters with vehicles. They talk about the exception to the warrant requirement being based upon the mobility of the vehicle. Now, there are some confusing statements, I guess, if I recall them, where the Supreme Court says something to the effect of impoundment is not a requirement, it's an alternative. And they talk about impoundment being perhaps more invasive than a search. But as I read this case law, at least preliminarily, I don't believe that the Supreme Court has said that you can't, that there's a per se right to search a vehicle without a warrant, that there must be some showing of exigency.

In this particular case, the testimony that we've heard suggests that there were a large number of officers on the scene, that there was advance information about the vehicle being used in the drug operation, and there are -- let's put it this way. I question. I'm not making any findings. I question whether a showing of exigency has been made.

Now, therefore, the way I would like to proceed on this, because this is an issue that has intrigued me because as I read these decisions I just don't know where the Supreme Court is and where they're going. I see that the Rodriguez case was a decision. It's an area of the law that I think is not crystal clear. But what I would like to do is a to adjourn this proceeding at this time, hear any arguments that any of you wish to make on the exigency issue on the next date, and then see if it's necessary to go beyond that. But I want to give you the opportunity to respond and defense counsel to come in with anything else that they may have. I think the date I would like to set this for is Wednesday of next week.

MR. MECOLI: Your Honor, unfortunately I will be out of town next week, to December second.

THE COURT: How about if we set it for Tuesday of the following week? Well, Mr. Clark, how does my schedule look there?

MR. SAGOT: Judge, I'm in Doylestown on the third, two matters.

THE COURT: Let's just see what we have.

COURT CRIER: You're in Doylestown when, counsel?



MR. SAGOT: The third of December.

MR. CORRIGAN: I have two matters on that day as well, Your Honor.

THE COURT: How about Wednesday, the fourth?

MR. CORRIGAN: Fine, Your Honor.

MR. SAGOT: I have four matters on that day now. If Your Honor wishes to schedule it, I'll just fit it in. The fifth in the morning would be much better.

THE COURT: Is that a Thursday, the fifth?

COURT CRIER: Yes, sir.

THE COURT: Let's make it Thursday, the fifth. If any of you wish to submit any written memoranda on that and copy the other side, I'll consider it. Or if you believe there's a case that controls, you need only send me a letter with a copy to the other side with the cite of the case.

Is there anything further on this matter at this time?

MR. GAY: I just have a question, Your Honor, and I don't mean to hold this up. When you say argue the exigency issue, should we also be prepared to argue the sufficiency of the Commonwealth's evidence and all issues of credibility as well?

THE COURT: Yes. I mean, I want to highlight that exigency issue because that's the issue that's foremost in my mind. The issue of facts may not have

to be reached. So what I'd like to do is recess until two unless we have something that you want to knock out.

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(Hearing recessed.)

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IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

- - -

| | | |
|---|---|---|
| COMMONWEALTH | : | |
| vs. | : | |
| EDWIN LABRON | : | No. 9009-2318 |
| -and- | | |
| RICHARD RAMOS | : | No. 9009-2300 |
| -and- | | |
| LUIS LAJARA | : | No. 9009-2314 |

- - -

Courtroom 254 City Hall
Philadelphia, Pennsylvania
Thursday, December 5, 1991

- - -

BEFORE: HONORABLE G. CRAIG LORD, J.

- - -

APPEARANCES:

GINO MECOLI, ESQ.
Assistant District Attorney
Counsel for the Commonwealth

VINCENT CORRIGAN, ESQ.
Defender Association
Counsel for Defendant Labron

ALLAN SAGOT, ESQ.
Counsel for Defendant Ramos

ANDREW GAY, ESQ.
Counsel for Defendant Lajara

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**PRETRIAL MOTIONS**
**(VOLUME III)**

PROCEEDINGS.

THE COURT: All right. Where is the third attorney on this case, do we know?

MR. SAGOT: That's Mr. Corrigan, Your Honor.

MR. GILLISON: I'll stand in, Your Honor.

THE COURT: Have you heard from Mr. Corrigan?

COURT CRIER: I heard from him earlier this morning, Your Honor. He told me he would be in his office.

THE COURT: Are all the defendants here?

COURT CRIER: No, Your Honor. The third defendant is still not down. He's in custody.

THE COURT: Mr. Mecoli, let me ask you this. Do you have anything further that you wish to present in the way of law?

MR. MECOLI: Your Honor, I have argument with respect to aspects of the case. I don't have any law on the exigency matter which you asked me to look into.

THE COURT: I'm going to go forward and hear what you have to say argument-wise and we'll give Mr. Corrigan an opportunity to focus in on it if I deem it necessary.



Frankly, I didn't see how the record before me was sufficient to permit a warrantless entry into the car. I'm prepared to hear what you have to say.

MR. MECOLI: I have two arguments, Your Honor. My first argument goes to defendants respectfully as to Mr. Sagot and Mr. Gay, and that would be with respect to the expectation of privacy. Neither of these defendants exercised control over the trunk or the car. They handed items to these individuals who put the items in the trunk. My first argument goes to Commonwealth versus Ferretti, that they absolutely have no legitimate expectation of privacy in that trunk in order to contest what was taken out of it at the time.

THE COURT: So you're saying that they don't have standing.

MR. MECOLI: No, Your Honor. They have automatic standing under Commonwealth versus Sell but standing is different than a legitimate expectation of privacy. That doesn't automatically give them the right to legitimate expectation of privacy such that if I had a bag of something that is contraband and I throw it away, it's the same thing, Your Honor. I could contest that that bag was taken illegally or there was a forced abandonment issue under Sell because I have standing under the Pennsylvania State Constitution. However, do I have a legitimate expectation in an item that I have abandoned?

Neither of these defendants have any expectation or interest. They've passed these items to someone else, gave them up, abandoned them, no interest right there. And the other person put them into the trunk. So as to them, Your Honor, they have no basis on which to contest that that trunk was opened at all. No expectation of

privacy, none whatsoever. And that's our argument as to these defendants and also to Mr. Corrigan's defendant.

THE COURT: Well, Mr. Corrigan's defendant, as I recall, wasn't he the one that was observed opening the trunk with the key or the keys were handed to him?

MR. MECOLI: He put the items in there. That's correct, Your Honor. And again, as I point out, the motion goes to these two defendants but it also includes him. He was seen being handed items out of there. They key was handed off to another individual who handed it to him. Now, whether he has a reasonable expectation of privacy based on that, we would dispute that.

THE COURT: What's your second argument?

MR. MECOLI: The second argument goes to exigency. In these circumstances, the officer sees what he sees and definitely has probable cause to enter the vehicle.

THE COURT: The probable cause is not the issue, as far as I'm concerned. I'll hear what the defense counsel has to say.

MR. MECOLI: As to the exigency, Your Honor, you pointed out the Jenkins case which was a Superior Court case that was decided afterwards. However, I would submit to you, Your Honor, that it is persuasive authority and should be looked at in this matter. It is the exact same circumstances we're dealing with here. The exigency of a car is presumed by its mobility. In this case, there's no reason for the police to say let's immobilize this car and get a warrant. That's an option



that they have. There's no requirement to get a warrant. Exigency with a vehicle is presumed.

I'd also point out to Your Honor that they're on the scene at an undisclosed location. Now, the officer was very reluctant to give any information on that and that's another issue in this case.

THE COURT: At the moment it isn't. At the moment, if the Court rules that there was no warrant, that you needed to get a warrant and you didn't, nothing else really matters.

MR. MECOLI: I understand, Your Honor. But nevertheless, the officer brought out in his testimony this is a confidential location, that people could be endangered and he wishes to keep it confidential. Certainly at that point with a car in the street and officers coming in to make an arrest and seizing a large amount of drugs, with the fact that one of the people who was seen in this trunk has left the area and is not apprehended, with all those facts, Your Honor, for the officers to sit there and immobilize the car and wait is not something that would meet with the exigencies of the situation. Anyone could come back to that car. Someone could come and get in it and drive away. Now, the officers could sit there, but how are they supposed to process these defendants? Are they supposed to wait?

THE COURT: I'm not here to decide what my policy would be if it was up to me to rewrite the Fourth Amendment. My task is to interpret the case law. And when you say that with a car exigency is presumed, you'll recognize that the pronouncements of the Pennsylvania Supreme Court say that automobiles are not without the warrant protections, totally without the



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warrant protections of the Fourth Amendment. And on the record before me, there's testimony that there were eight police officers on the scene or that were in the vicinity. There were two defendants to be arrested. There was no -- only because I asked the question was there any testimony about whether the car was mobile. And furthermore, the record was that there was knowledge that this particular car was used in the storage of drugs and there was no testimony about any problems, anything that would have been difficult, any particular difficulty that would have been presented in immobilizing this car.

Now, I have yet to find a case that says that if you have probable cause to search a car, you don't need a warrant without showing any more. All the cases that I've read say that the reason that the warrant requirement can be dispensed with as to cars in certain situations is for the mobility and the exigency, and they look to certain particular things to create an exigency. And I don't see it. What it sounded to me like you were saying is that there's a generic exception to the warrant requirement for automobiles. What was the exigency in this situation?

MR. MECOLI: Your Honor, I'm not saying that there is a generic exception. There is a diminished expectation of privacy in an automobile based on its inherent mobility. That's the language that the Court uses.

THE COURT: But what is the exigency in this case?

MR. MECOLI: If I may point out. In the cases where you cited, Baker and I believe the other one was Rodriguez.



THE COURT: Rodriguez was one of them, yeah.

MR. MECOLI: If you look at the Baker case, Your Honor, in that case you're dealing with a traffic stop where certainly in that case they could have stopped, immobilized the car, had officers stand around it and gotten a warrant and then gone into it. It's the same situation. But they didn't, Your Honor, based on the fact that there's a diminished expectation of privacy, based on the fact that there is an option available to the officers. It is not something that is required of them when they're dealing with a situation with an automobile.

Again, Your Honor, I would point to Commonwealth versus Jenkins, which is again the same, on all fours fact scenario as the fact situation.

THE COURT: Which one?

MR. MECOLI: Commonwealth versus Jenkins. In that case, it's the same situation. They handed drugs out of a trunk of a vehicle which are then for sale. The officers see this, go into the trunk without a warrant, and the Superior Court declared that reasonable under the circumstances. And, Your Honor, based on that case and based on the fact that in the cases you cited, Baker, there is no warrant at all. As a matter of fact, those cases deal with a different situation but the same exigency, the same diminished expectation of privacy in that car. That goes back to the same argument that I had before. These defendants had no expectation of privacy in that vehicle in any case.

THE COURT: You'll notice in the Jenkins case, they point out, they distinguish Jenkins from Ross in

that they point out that in Ross, the police had information about the specific vehicle prior to going out on the scene. Now, I'm not sitting here defending the logic of these decisions.

MR. MECOLI: I understand.

THE COURT: What I'm saying is that I don't think, other than the fact that the car, in this particular case, it turned out the car was immobile because you'll recall the officer testified they tried to start it and couldn't get it started. I don't know that that's all that relevant because it looked like it might have been mobile. But be that as it may, I don't see any cases that say that just because a car is mobile you don't need a warrant. I mean, you saw yourself the statement in here that says that the warrant requirement is not inapplicable to automobiles.

MR. MECOLI: Your Honor, I'd ask you one question, then. What in Baker makes that any more exigent than the situation at hand?

THE COURT: Pardon me?

MR. MECOLI: What about the case of Baker makes it any more exigent in that situation where that car was searched than in Jenkins?

THE COURT: Well, in Baker, for example, I think the Court emphasized that the car was suddenly encountered. That was their words. It was encountered in the course of a traffic stop. Now, I must tell you that I don't really see much difference between a car that is suddenly encountered and one that's encountered in the way that it was encountered here. In other words,



between a traffic stop and one that isn't. But nevertheless, that's the way the courts seem to be going.

Now, I understand your point. What is the standing case you cited to me?

MR. MECOLI: Commonwealth versus Ferretti. F-E-R-R-E-T-T-I.

THE COURT: Do you have a copy of that for the Court?

MR. MECOLI: Yes, I do, Your Honor.

THE COURT: If you expect me to straighten out the law of standing in Pennsylvania in this case, you should read Commonwealth versus Peterson and see how confused the appellate courts are on that.

MR. MECOLI: Again, I'd emphasize that we are not arguing standing here, which is automatic under Sell, but a reasonable expectation of privacy, which could only happen in something that you have control over or interest in. Neither of these defendants has any interest in this automobile, none.

THE COURT: I understand your argument. Do you wish to respond, Mr. Sagot?

MR. SAGOT: I do wish to respond, Your Honor, but my thrust is going to be slightly different than the issue that the Court framed. If I could. Specifically during the motion to suppress, we have the notes from it and I reviewed them completely yesterday. I specifically asked the officer whose car it was, the Buick. Did you run the tag? This, that and the other. To this day we don't know whose car it was. We

cannot through the Commonwealth establish any right to privacy of that vehicle, for that omission.

But I think there's a predicate issue that Your Honor must decide before even reaching the warrant issue and the predicate issue is whether or not the officers had enough at that time based on credible testimony before the Court to be in that position.

THE COURT: I've assumed for purposes of this argument today, I have assumed the credibility issue.

MR. SAGOT: Well, I would argue strongly that in this particular case, it's an assumption that should not be reached.

THE COURT: Well, I can assume anything. You're saying I shouldn't decide it that way.

MR. SAGOT: I understand that, Your Honor. My position is, and I'm not speaking for Mr. Gay or Mr. Corrigan, is that the testimony up to the point that that car is searched is so convoluted and so fraught with fabrication that on the issue of credibility alone, Your Honor need not reach that point. From the notes of testimony, and I've highlighted most of them, we have a situation where a transaction was observed from somewhere between twenty-five --

THE COURT: Could I make it real simple today? I want to limit stood to legal arguments and leave aside the credibility.

MR. SAGOT: Very well.



THE COURT: That's the way I want to proceed in this thing, particularly with Mr. Corrigan not here. If you have any legal response to what he has to say.

MR. SAGOT: I'll defer to Mr. Gay on that.

THE COURT: Mr. Gay?

MR. GAY: Judge, there is a clear distinction between an automobile that's stopped in traffic and the situation that presented itself in this case. I mean, it is obvious that if there are individuals in an automobile and the police are there confronting them, there is the possibility of danger and that the police have a right under those circumstances to search to protect themselves, and that's I think a clear and simple distinction that could be made in this case. If you're not going to get into the --

THE COURT: I'm not today.

MR. GAY: If you're not going to get into the credibility issue, I'd wish to point out to the Court that the Commonwealth has presented no evidence to this Court to show that either of these defendants abandoned any right of privacy in that vehicle. The Commonwealth has not presented any evidence to show that neither of these defendants never had a right of privacy in the vehicle. The defendants have raised the suppression issue and have claimed a right of privacy therefore in this vehicle, and it is the burden of the Commonwealth under those circumstances to present evidence that they do not have a right of privacy in that vehicle or that the right of privacy has somehow been abandoned.

Now, if the Commonwealth intends to show abandonment in this case, that must be done by clear and convincing evidence. You can't meet that burden or you can't even meet the preponderance burden when there's no evidence at all before the Court with respect to the connection between these defendants and that vehicle. All you have here is the pronouncement of Sell that they have the right to raise the issue. And that, sir, I think is as much as could be said under the circumstances.

THE COURT: Let me ask you this, Mr. Gay. I think our appellate courts are struggling with the issue of what Sell really means. There was a recent panel decision by Judge Beck, Judge Popovich and Judge Hoffman, three eminent members of the Superior Court, and it involved entry into a fortified drug house. And two of the judges, well, Judge Hoffman particularly said that his view of Sell was that the, what Sell means is that if anyone has a constitutional right of privacy in the area that was searched by the police, that a defendant who has an interest in the outcome of the case can raise the Fourth Amendment issue regardless of whether it's the defendant's particular right of privacy that was violated. That's what Judge Hoffman says that Sell means. In other words, and he say it in so many words, that Sell means that a defendant may vicariously assert the constitutional rights, invasion of constitutional rights of another person even though his own particular constitutional rights aren't violated in that particular case.

So, for example, under Judge Hoffman's analysis of Peterson, I believe he would conclude that whether or not the two defendants that are here today had a privacy right in the automobile, they must, they may nevertheless assert that someone's privacy right was violated in going into that automobile without a warrant. And if



they're successful in that assertion, they prevail. Judge Beck on the other hand, I think, is closer to the federal thinking on it, where there seems to be a elimination of the vicarious, the ability to vicariously assert somebody else's rights.

I think this is an important issue in Pennsylvania and it really is one that should be resolved because so many different cases are really affected by, you know, what is, you know, who is going to be allowed to assert rights. If Sell means what Justice, Judge Hoffman says it means, then Mr. Mecoli's argument about your clients had no expectation of privacy in a car fails. If Judge Hoffman's or Judge Beck's view is correct, then I think we have to get into the question of whether the Commonwealth has established in this case that your particular clients have no expectation of privacy interest that car.

MR. GAY: So you want us to brief the argument to the Superior Court.

THE COURT: Well, I think what I would like to do is this. This is a significant enough issue that I would like both the District Attorney and defense to brief the issue of whether the officers needed a warrant to enter the car and if only for the reason that I don't know how, if I was a police officer out in the field, I would possibly figure out when I needed a warrant and when I didn't, because there's just, you know, some very confusing law in this area.

So what I'd like to do is give this a date in January. Give it a date for briefs to be submitted.

MR. GAY: Judge, may I ask for a February date for briefs? I've got six right now that I'm working on.

MR. SAGOT: I would join in that request.

THE COURT: I'll give it an early February date.

COURT CRIER: Do you want February, Your Honor.

THE COURT: Yeah. Maybe first or second week.

MR. SAGOT: May we have the week of the tenth, Your Honor, if that's possible?

THE COURT: That's all right with me.

COURT CRIER: Thirteenth.

MR. SAGOT: Thirteenth I'm on trial in a federal matter.

THE COURT: We'll have the briefs submitted by the thirteenth and then we'll list the case for the twentieth. I wanted to take the time to discuss this with counsel present because I want to focus the thing on where I am in this case, and I would urge you all to read Commonwealth versus Peterson. It's a panel decision by Beck, Hoffman and Popovich having to do with a fortified drug house.

MR. SAGOT: This room, Your Honor?

THE COURT: We'll list it out of 617. I don't know where I will be.

MR. GAY: Judge, do you have the cite on Peterson.



THE COURT: I don't, but if you call my law clerk and tell her that it's in the outline for the class I conducted yesterday, she'll get it for you.

MR. SAGOT: Can we have the name or cite for Ferretti?

THE COURT: Ferretti is 577 A.2d 1375.[1] That should conclude this matter.

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(Hearing recessed.)

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IN THE COURT OF COMMON PLEAS OF
PHILADELPHIA COUNTY
FIRST JUDICIAL DISTRICT OF PENNSYLVANIA
CRIMINAL TRIAL DIVISION

- - -

COMMONWEALTH :
vs. :
EDWIN LABRON : No. 9009-2318
-and-
RICHARD RAMOS : No. 9009-2300
-and-
LUIS LAJARA : No. 9009-2318

- - -

Courtroom 475 City Hall
Philadelphia, Pennsylvania
Thursday, March 5, 1992

- - -

BEFORE: HONORABLE G. CRAIG LORD, J.

- - -

APPEARANCES:

JOHN MINGES, ESQ.
Assistant District Attorney
Counsel for the Commonwealth

ALLAN SAGOT, ESQ.
Counsel for Defendant Ramos

ANDREW GAY, ESQ.
Counsel for Defendant Lajara

VINCENT CORRIGAN, ESQ.
Counsel for Defendant Labron

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PRETRIAL MOTIONS (Cont'd.)

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PROCEEDINGS.

THE COURT: Are you ready to proceed, Mr. Minges?

MR. MINGES: Yes, Your Honor.

MR. SAGOT: Your Honor, before you begin, if Your Honor is really going to make a decision from the bench, I don't have a problem with that. I'll waive an interpreter on behalf of my client.

THE COURT: That's all that I'm going to do.

MR. SAGOT: Thank you.

THE COURT: We're here for the Court to render a decision on a motion to suppress which was filed on behalf of all three defendants and litigated before this Court towards the end of November. I have received very helpful and able briefs from the Commonwealth and several of the defendants and I'm prepared to render the Court's decision at this time. I'll give a brief explanation of the Court's decision. Should it become necessary for the Court to issue formal findings of fact and conclusions of law, I will do so.

First of all, as to Mr. Ramos and Mr. LaJara, I have reviewed the various cases to see whether any violations of the fourth amendment rights of Mr. Ramos and Mr. LaJara have occurred in this case or whether, conversely, the Commonwealth has established by a preponderance of the evidence that no, that the evidence that was recovered was not recovered, was recovered without violation of these defendants' rights.

I do believe that there was no violation of the constitutional rights. The Commonwealth has persuaded me by a preponderance that there was no violation of the constitutional rights of Mr. Ramos and Mr. LaJara. I believe that in this particular case, that neither of these defendants had any reasonable expectation of privacy as to the trunk of the automobile over which they appeared to be asserting no dominion or control and in fact others were asserting that control. Accordingly, as to Mr. Ramos and Mr. LaJara, the Court will dismiss or deny the motions to suppress.

With respect to Mr. Labron, I'm going to grant the motion to suppress based on the recent Pennsylvania Supreme Court decision of Commonwealth versus Rodriguez. I believe that Rodriguez stands for the proposition that in order to search a vehicle in Pennsylvania without a warrant, assuming that you had probable cause, which I think is not an issue in this case, some exigency must still be shown. It appears that under the law as it presently stands, if a vehicle is, quote, suddenly encountered, and quote, perhaps in the form of a car stop, that our appellate courts regard this as sufficient exigency to permit the exception to the warrant for that vehicle suddenly encountered. However, in this particular case, there was testimony that the officers knew that drugs would be stored in a, I believe the vehicle was a Lincoln that was involved here. They knew the type of car. They knew the location. And I believe that this is distinguishable from a car stop where, in this situation, the case at hand, the prior knowledge allowed for some planning. There was also testimony that there were eight or ten police people in the area. The evidence as to the car's mobility was weak if not nonexistent. And there was no evidence that the police, that anyone knew of the police presence in the area so as to create exigency under that type of analysis. So



accordingly, I'm going to grant the motions to suppress as to Mr. Labron.

Now, my suggestion is that I give all three defendants a date on the same date in the majors program with the idea that as to Mr. Labron, that date will be for status of appeal. As to the other two defendants, the date would be the date for trial. So, John, could you call Criminal Listings and ask them, tell them motion to suppress, three co-defendants, motion to suppress granted as to one, denied as to two. We'd like to list them all three together. It's a majors case. One will be for status of appeal and the other two will be for trial.

MR. CORRIGAN: Judge, with respect to Mr. Labron, he's not here. He's in custody. I think he's currently being held on a hundred and fifty thousand dollars bail for this case. I'd ask that Your Honor permit him to sign his own bail at this point.

THE COURT: Here's the thing. Do we have an extract on the guy and everything else?

MR. CORRIGAN: I do, I believe, have a current extract. He has no prior convictions, I do know that.

THE COURT: Can I see if we have an extract on Mr. Labron?

COURT CLERK: Here's one from November.

THE COURT: Has he been incarcerated since this trial?

MR. CORRIGAN: He's been incarcerated since November of 1989.

THE COURT: On this case?

MR. CORRIGAN: On this case, Judge, yes.

THE COURT: What was his bail before?

MR. CORRIGAN: At some point there was a failure to appear on this case and then at that point his bail, he turned himself in, I believe, and then his bail was raised to a hundred and fifty thousand dollars or whatever the exact amount is. I'm not sure. But I know it's over a hundred thousand dollars. I'm sorry. Since November of 1990, Judge. Not since November of 1989. Well over a year, though.

MR. SAGOT: Your Honor, there was a transcript that was made and part of the record. It was the only copy we had. In the companion matter of Commonwealth versus Melendez.

THE COURT: Are you looking for that? Is that it?

MR. SAGOT: We need those notes for any future proceeding.

THE COURT: Let me just check something. With respect to the bail request for --

MR. MINGES: May I be heard before the Court decides?

MR. MINGES: Sure.



MR. GAY: Judge, before you proceed to the matter of bail, may I be heard on a motion for reconsideration of the Court's decision on this case with respect to one issue which the Court may not have addressed?

THE COURT: Sure.

MR. GAY: I think it's fairly clear from all the evidence in this case and the charges against these defendants that the Commonwealth's theory is that all of the defendants were engaged in a conspiracy to possess the drugs. Under any theory, possession by any of them would be possession by all, as a consequence of which there would be a reasonable expectation of privacy on the part of anyone who was a party of the entire enterprise.

THE COURT: Well, let me say this. I did consider that aspect of the case. And I will concede that if you want to call it the question of standing or the question of when one could assert that their interests are, their fourth amendment interests are brought into play, it's an area I think the courts are working on. But this is my best judgment at the present time as to what the state of the law is. And I do understand that argument and I think is one that is a argument that has to be given some weight. But this is my best judgment at this time as to what the state of the law is.

MR. GAY: Yes, sir.

THE COURT: I may be wrong, but I took my best shot at it. Mr. Sagot?

MR. SAGOT: By the statements that you made earlier, since Your Honor is now sitting in the civil program, Your Honor will not be hearing this for trial?

THE COURT: No.

MR. SAGOT: That being the case, Your Honor, I'd also ask you to at this time make a motion to reconsider based on an issue that the Court did not touch in it findings. We sat through this motion for the better part of a day, I believe, and I believe that one thing that stood out throughout the entire motion was the absolute lack of credibility of the testifying officer. We had provided the Court --

THE COURT: If you want to argue credibility, I've made by determination in that regard, sir.

MR. SAGOT: Very well. That was my concern, Your Honor.

THE COURT: Yeah, I've made that determination. I wouldn't have decided it this way without finding the officer's observations credible.

All right. Now, bail.

MR. MINGES: Very briefly, Your Honor. As the Court knows, I'm handling the matter today for Mr. Mecoli, who is away on vacation. I've reviewed Mr. Labron's ROR report. It would appear that he has little, if any, contact in the community. There are no significant ties that would keep him here.

Additionally, upon reviewing the file very briefly, it appears to me that the defendant apparently did not turn himself in on his own but very likely was



brought in from bench warrant status as a result of a subsequent arrest by other narcotics officers in the same general area.

THE COURT: Can I see the Quarter-Sessions file for Mr. Labron? Are they working on a date for us?

COURT CRIER: Yes.

MR. CORRIGAN: Judge, he may have been picked up on the bench warrant but he certainly was not picked up in relation to any other matter. The only case that he has is this one.

THE COURT: It looks like he bench warranted here at arraignment.

MR. CORRIGAN: That's correct. Then the bench warrant was withdrawn and a hundred fifty thousand dollars bail was imposed on the twenty-eighth of November of 1990. He's been in custody since that time.

THE COURT: Let me say this. He's been in custody since when?

MR. CORRIGAN: Since the twenty-eighth of November, 1990.

THE COURT: Any objection to my looking at his ROR sheet.

MR. CORRIGAN: No, Judge. It shows three prior failures to appear prior to his arrest on this matter, Judge. I also would dispute the District Attorney's assertion that he has no significant ties to the community based on the ROR sheet shows that he's been a resident,

living in the same residence for a period of five years and that he's been a Philadelphia area resident at that single location for a period of five years prior to his arrest, which is longer than I've been a resident in Philadelphia and longer than I have lived at my present address, but I consider myself to have significant ties to Philadelphia at this point.

THE COURT: Let me say this, Mr. Corrigan. I do have some reluctance in setting the bail by imposing upon Mr. Minges, you know, who's unfamiliar with the matter and not knowing about the situation. I would make this statement to you: That how long does it take you to get a bail petition decided by the motions court judge?

MR. CORRIGAN: Quite some time. I couldn't say to be sure, Judge.

THE COURT: Does it take a month?

MR. CORRIGAN: At least a month, I would think.

MR. GAY: It could.

MR. CORRIGAN: Judge, at this point I fail to see what purpose is to be served by keeping him in custody. If the Commonwealth does not appeal thirty days from now, he'll be released at that time, and if the Commonwealth does appeal, it's going to be a couple of years before the gets case gets back for trial even assuming that the Commonwealth prevailed.

THE COURT: There's no question in my mind that I would be inclined based upon what I know right now to give the guy very low bail. However, I would



prefer to give Mr. Mecoli the opportunity to have his say since he's been with this case. Now, in order not to keep your client, when is Mr. Mecoli going to be back?

MR. MINGES: I don't know. I can find that out.

THE COURT: I would say this: Mr. Mecoli need only call Mr. Corrigan on the phone and say what he has to say and I'll decide the bail issue. It's not something I want to get into a big brouhaha about but I do want to hear what he has to say. Would you find out when he's going to be back and let Mr. Corrigan know? Then if it's is if it looks like he's going to be gone an extended period of time, I'll act in some fashion.

MR. CORRIGAN: Are you going to be in court next week?

THE COURT: I'm going to be on vacation, theoretically, but as a practical matter I'm going to be in my office, in and out of my office finishing up some work. Did we get a date yet?

COURT CLERK: I believe he's still on the phone, Judge.

THE COURT: Why don't I do this, then. Well, I'll wait just a minute.

MR. SAGOT: If I could, just in case Your Honor didn't write it down. My request for those Melendez notes.

MR. MINGES: They were used at the motion to suppress?

MR. SAGOT: Apparently the narcotics officer. that's a. he was another defendant in this case and the narcotics officer also testified in that case.

THE COURT: Well. it's an exhibit.

MR. SAGOT: Exactly. I have no problem with Your Honor retaining an exhibit. but we need a copy of them and that's our only one.

THE COURT: Why don't I just copy it and send it to you.

MR. SAGOT: Would you please do that?

THE COURT: Sure.

MR. SAGOT: Do you also have some preliminary hearing notes also?

THE COURT: Yeah. You're asking for a copy of the notes from Wednesday, March the sixth, the Melendez preliminary hearing?

MR. SAGOT: That's exactly correct.

THE COURT: All right. We'll copy it for you. I'm going to give this back to our clerk for the Quarter-Sessions file.

COURT CRIER: Judge, on this matter it's going to be 4/3. B section. Room 425. pretrial, nine o'clock.

- - -

(Hearing concluded.)

- - -

ORIGINAL

No. 95-1691

Supreme Court, U.S.
FILED
MAY 20 1996
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

PENNSYLVANIA - PETITIONER

VS.

EDWIN LABRON - RESPONDENT

MOTION FOR LEAVE TO PROCEED IN *FORMA PAUPERIS*

The petitioner asks leave to file the attached Brief In Opposition to the Commonwealth of Pennsylvania's Petition for a writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

[x] Petitioner has previously been granted leave to proceed *in forma pauperis* in the following court(s):

All Pennsylvania Courts.

[ ] Petitioner has not previously been granted leave to proceed *in forma pauperis* in any other court.

Petitioner's affidavit or declaration in support of this motion is attached hereto.

Edwin Labron
(Signature)

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SUPREME COURT, U.S.

30 pp

**AFFIDAVIT OR DECLARATION IN SUPPORT OF MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS***

I, Edwin Labron, am the respondent in the above entitled-case. In support of my motion to proceed without being required to prepay fees, costs or give security therefor, I state that because of my poverty I am unable to pay the costs of this case or to give security therefor; and I believe I am entitled to redress.

I further swear that the responses I have made to the questions and instructions below relating to my ability to pay the cost of proceeding in this court are true.

1. Are you presently employed? Yes___ No X___

a. If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

b. If the answer is no, state the date of your last employment and the amount of salary or wages per month which you received. I worked about 9 months during 1994. I received about $650 a month.

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other sources? Yes_X_ No___

a. If the answer is yes, describe each source of income and state the amount received from each during the past twelve months. S.S.I. - $85/month
Social Security - $435/month

3. Do you own any cash or have a checking or savings account? Yes X__ No___

a. If the answer is yes, state the total value of the items owned. about $200

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? Yes___ No X__

a. If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons.

I declare under penalty of perjury that the foregoing is true and correct. Executed on: May 17, 1996.

Edwin Labron
(Signature)

NO. 95-1691

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

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COMMONWEALTH OF PENNSYLVANIA

V.

EDWIN LABRON,
Respondent

---

BRIEF IN OPPOSITION TO THE COMMONWEALTH OF PENNSYLVANIA'S PETITION FOR A WRIT OF CERTIORARI

---

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
Identification No. 13255
HELEN A. MARINO, Assistant Defender
ELLEN T. GREENLEE, Defender

Defender Association of Philadelphia
121 North Broad Street
Philadelphia, Pennsylvania 19107-1913
Identification No. 00001
(215) 568-3190

May, 1996

## QUESTIONS PRESENTED

1. Should the Petition for Writ of Certiorari be denied because Petitioner has inaccurately stated the facts necessary to this Court's consideration of the merits of the case, and has thereby framed for review an issue different from that decided by the Pennsylvania courts?

2. Should the Petition for Writ of Certiorari be denied because the state court's judgment rests on adequate and independent state grounds, namely Article I, Section 8 of the Pennsylvania Constitution?



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**STATEMENT OF JURISDICTION**

This Court is without jurisdiction to hear the case at bar because the decision of the Pennsylvania Supreme Court rests upon adequate and independent state grounds, namely, Article I, Section 8 of the Pennsylvania Constitution, as discussed more fully, *infra*.

**CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED**

In addition to the Fourth and Fourteenth Amendments of the United States Constitution, set forth in the Commonwealth of Pennsylvania's Petition for Writ of Certiorari, this case involves Article 1, Section 8 of the Pennsylvania Constitution, and Rule 323(h) of the Pennsylvania Rules of Criminal Procedure, 18 Pa. C.S.

Article I, Section 8 of the Pennsylvania Constitution provides:

> **Security from searches and seizures**
> The people shall be secure in their persons, houses, papers and possessions from unreasonable searches and seizures, and no warrant to search any place or to seize any person or things shall issue without describing them as nearly as may be, nor without probable cause, supported by oath or affirmation subscribed to by the affiant.

Rule 323 of the Pennsylvania Rules of Criminal Procedure, which governs the procedure for motions to suppress evidence and hearings on such motions, states in pertinent part:

> (h) The Commonwealth shall have the burden of going forward with the evidence and of establishing that the challenged evidence was not obtained in violation of the defendant's rights. . . .

## STATEMENT OF THE CASE

Respondent Edwin Labron and others were arrested on August 24, 1990, and charged with conspiracy and violations of Pennsylvania's Controlled Substance, Drug, Device and Cosmetic Act. After the arrest, police conducted a warrantless search of a stationary car that respondent and others allegedly were using to store the drugs.

Respondent moved to suppress the physical evidence (alleged cocaine) seized from the car, citing both state and federal constitutional violations. App. 57-58. At the hearing on the motion, police testified that on August 24, 1990, they conducted surveillance of a drug dealing operation carried on at a certain Philadelphia street. The police had been gathering information about the operation for some six weeks, but acted on August 24 hoping to make a "bust" timed to allow police not only to arrest the street dealers, but also to intercept and seize a new shipment of drugs and the persons delivering it. One officer conducted surveillance, watching what appeared to be the sale of drugs on the street awaiting the delivery of more drugs, while ten others acted as backup. App. 59-66, 132. After about two hours of watching, the surveilling officer observed the delivery. App. 66-70. This new shipment was placed in the trunk of the same car that the street dealers had already been using to store the drugs they were selling. App. 68-69. Backup officers were contacted and arrested the parties involved, including respondent, who is alleged to have been one of the persons selling the drugs to street customers. Police then searched the car that had been used to store the drugs



for the street sales. They recovered alleged cocaine from the truck and money from the interior. App. 70-73, 126-132, 194-96, 199-200.

On March 5, 1992, Judge G. Craig Lord of the Philadelphia Court of Common Pleas granted the motion and suppressed the evidence seized from the car that was parked on the street and had been used to store the drugs. The evidence that was critical to the suppression court's decision was testimony that, even before going to the scene to make their bust, the police possessed substantial information, from various sources including the surveilling officer's own prior observations, that targeted the location as well as the particular car ultimately searched. That information could have allowed the police to get a warrant before they even went to the scene. App. 45-46, 52. The Pennsylvania Supreme Court accepted the suppression judge's findings, and agreed with his reasoning. App. 21-25.

Throughout its Petition for a Writ of Certiorari, petitioner inaccurately and inadequately recounts those facts that were essential to the state courts' decisions. Petitioner instead skirts the true facts of this case, repeatedly suggesting, in contravention of the record and express findings of the state courts, that the police were on the scene that day for the purpose of gathering needed corroboration for otherwise uncorroborated information. Petitioner thus inaccurately implies that police could not have had probable cause, and thus could not have obtained

a warrant, until they made their observations on the scene that day. Petition, pp. 3, 7, 8, 11. The record belies this view.

More specifically, the evidence that the Commonwealth seeks to avoid is as follows. As the suppression judge noted in his findings of fact,[1] "the credible evidence at the hearing on the motion to suppress established that a considerable time prior to noon on August 24, 1990," Police Officer Gerald Nimmo "received information that led him to believe that Raphael Melendez, acting with others, was selling cocaine in the 900 block of Auburn Street in Philadelphia (N.T. 85)." App. 45. Specifically, the hearing judge relied upon the Officer's testimony that:

> A. [Officer Nimmo]: I had information that Raphael Melendez lived at 913 Auburn Street. He was the one that had the workers on the street and that he had received, he would receive his cocaine. It would be delivered on Auburn Street and he used several cars to store the stuff. One was a Lincoln. There was another car on the north side of the street. I don't recall what that was now. It was an abandoned car. There was no tags on that.
>
> Q. And when did you get that information?
>
> MR. MECOLI [the prosecutor]: Objection.
>
> THE COURT: Overruled.
>
> THE WITNESS: I had gotten that information from numerous, from several places, from my own investigation, from other people that had been arrested, from people that called from the neighborhood.

[1] The Commonwealth did not dispute the suppression court's findings of fact in its appeal, as those facts are supported by the record.



> BY MR. GAY [counsel for co-defendant]:
> Q. And how long had you had that information before you went to make your surveillance that day?
>
> A. I had been doing surveillances on that street.
>
> Q. I beg your pardon?
>
> A. I had been doing surveillances on that street and I had made several arrests, other arrests.

App. 132-33. The officer, however, had never seen a delivery made to Raphael Melendez, but had information that he would see one that day. App. 132-33.

Indeed, as Judge Lord specifically noted (see App. 46), the officer had been investigating for six weeks: Nimmo testified that he had had the block under investigation and had made no less than five narcotics arrests on the block within the past six weeks (App. 60-61). The officer had also testified that, in addition to his own arrests on the block, he had previously surveilled the block, walked through the neighborhood, and observed other transactions in the area. He had also been involved with other officers who had made purchases in that block. App. 61-62, 72, 132-33.

The officer was also explicit in his testimony that his advance information specifically included the car at issue here, a blue Lincoln:

> Q. [by the Court]: What information did you have about Mr. Melendez before you went out there that day?
>
> A. I had information that Mr. Melendez lived in 913 Auburn, that on the eastern half of Auburn Street he was the one that was selling. He had the people employed selling cocaine out

there. He had a heavy foot traffic and that they were storing cocaine when it was brought in. It was stored in either the abandoned car. It was a dark color. I don't recall. Or the Lincoln that was parked on the curb.

App. 168. And again on the court's questioning:

Q. Is it your testimony that before you went out to Auburn Street you had specific information about this Lincoln automobile before you got there that day?

A. That and another car, yes, sir.

App. 181.

Armed with that information and with as many as ten other officers acting as backup, App. vol.II, 142, the police went to the scene and allegedly observed respondent and another engage in what appeared to be drug transactions. As Petitioner relates, they were resupplied from the trunk of the Lincoln automobile. App. 59-60. Two hours later, when the anticipated delivery arrived and, like the other drugs, were stored in the Lincoln automobile, police moved in. They arrested respondent and others, searched the Lincoln, and seized alleged narcotics stored in the trunk. App. 72, 130, 132, 194-96. When police attempted to start the car to impound it, they found that it was inoperable. App. 180.

Based upon Pennsylvania decisional law, the suppression judge found that the prosecution had not met its burden under Rule 323(h) of the Pennsylvania Rules of Criminal Procedure, 18 Pa. C.S., to prove that respondent's state and federal constitutional rights had not been violated. On the facts found, the suppression court ruled that Petitioner, the Commonwealth, had not proved that any exigency justified applying an automobile exception to the warrant



requirement or excusing the police from obtaining a warrant under either the Pennsylvania Constitution or the United States Constitution. The evidence did not prove an unplanned stop by police of a moving vehicle, or the fortuitous development of probable cause to search during surveillance or investigation. App. 52-53. Rather, the evidence showed that well before the day of the search, the police officer knew that the car in question was routinely used to store drugs on that block, and the Commonwealth had not established that this information was inadequate to support a warrant. App. 53.

The Commonwealth appealed the suppression order, and the Superior Court reversed. See generally App. 36 et seq. The Pennsylvania Supreme Court, however, agreed with the suppression court. It accepted the suppression court's findings and conclusion that the automobile exception was not applicable because of the extensive advance information possessed by the police. It thus agreed that the evidence seized from the car pursuant to the warrantless search should have been suppressed, not only under the federal constitution, but under the state constitution as well. App. 21-25.

## ARGUMENT

I. A WRIT OF CERTIORARI SHOULD BE DENIED BECAUSE PETITIONER HAS INACCURATELY STATED THE FACTS NECESSARY TO THIS COURT'S CONSIDERATION OF THE MERITS OF THE CASE, AND HAS THEREBY FRAMED FOR REVIEW AN ISSUE DIFFERENT FROM THAT DECIDED BY THE PENNSYLVANIA COURTS.

Rule 14.4 of this Court's Rules of Procedure states that sufficient reason exists to deny a petition for certiorari where the petitioner has not presented with accuracy "whatever is essential to ready and adequate understanding of the points requiring consideration." Petitioner here has inaccurately stated the critical facts and conclusions which form the basis of both the suppression court's ruling and the Pennsylvania Supreme Court's holding. Accordingly, the petition should be denied.

Specifically, in its Statement of the Case and through its argument, the Commonwealth repeatedly states the case so as to lead the Court to believe that, before the police began surveillance on the day in question, the police had only an uncorroborated tip of drug activity at that location. Petitioner states to the Court that a "police officer investigating drug dealing on a particular street in Philadelphia got a tip that drug dealers were stashing cocaine in certain cars parked on the block," and that police went to the scene on August 24, 1990 to corroborate that "tip." Petition, p.3. Petitioner represents that, "Recognizing that the mere existence of a tip often will not establish probable cause, the police chose to corroborate their information through



surveillance at the scene." Petition, p. 7. Petitioner writes that "the Pennsylvania Supreme Court believed that, because the police had uncorroborated information about the car before they conducted surveillance, they were legally obligated to get a search warrant." Petition, p. 7. Petitioner asks this Court to believe that the Pennsylvania Supreme Court's holding in this case requires the police on the scene to "immobilize the suspect vehicle for several hours" in order to obtain the warrant." Petition, p. 11.

These assertions about the facts of this case and the Pennsylvania Supreme Court's decision are inaccurate and warrant this Court's denial of the requested writ. The facts, as found by the suppression court and accepted by the Pennsylvania Supreme Court, show that during a six week investigation of the Philadelphia street in question, police had learned the details of a drug dealing business operating at a specific end of a certain city block. Police knew that the dealers routinely stored drugs in one of two cars parked on that block. The record also establishes that the sources for this information were far more significant and varied than an "uncorroborated tip" from a single source. Quite the contrary, the officer's testimony was that the information came from numerous sources: from others arrested on the block, from neighbors, even from the surveilling officer himself. Moreover, police did not claim to need on-scene corroboration of their information about drug dealing or about the car. Rather, as the officer testified, police were expecting to see a delivery of more drugs and were waiting until that shipment

arrived before making their move. From the evidence, the lower court reasonably concluded that the information, corroborated through so many different sources over such an extensive period of time and targeting the automobile in question, could well have furnished probable cause well before the events of August 24 unfolded.

It therefore is a mischaracterization of this case for Petitioner to represent that the police approached the street on August 24 looking for corroboration because they had only unverified information in hand. From this mischaracterization of the facts of the case, however, petitioner builds its argument. Based on inaccurate facts, petitioner inaccurately represents the holding and necessary import of the Pennsylvania Supreme Court's decision and urges that the holding is in direct conflict with the precedents of this Court such as Carney v. California, 471 U.S. 386 (1985), and United States v. Ross, 456 U.S. 798 (1982).

First, nothing in the Pennsylvania Supreme Court's decision in this case would require police to impound or hold a vehicle "for several hours" so that police can obtain a warrant, as the Commonwealth claims. Nor would it require police to "wait further" to get a warrant and thereby risk the loss of evidence, as Petitioner claims. Petition, p. 11. Such a holding would be premised on a determination that police did not acquire probable cause until they were on the scene and actually encountered the vehicle, and thus could not have previously obtained a warrant. Those facts simply were not presented by this case. Indeed, when



presented with facts like that, the Pennsylvania Supreme Court, like this Court, has held that no warrant is necessary under the Fourth Amendment. E.g., Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991); Commonwealth v. Baker, 518 Pa. 145, 541 A.2d 1381 (1988).

Second, although the inaccurate facts related by petitioner allow it to posit a direct conflict with precedents of this Court such as California v. Carney, 471 U.S. 386 (1985), or United States v. Ross, 456 U.S. 798 (1982), there is no such conflict based upon the actual facts, as found by the state courts. Unlike the case at bar, in Carney and in Ross, police had uncorroborated information about a vehicle and illegal activity involving that vehicle. In each case, they went to the scene, obtained necessary corroboration, and promptly acted upon that corroboration by searching without a warrant. In each of those cases, this Court determined that the police were justified, under the automobile exception to the warrant requirement, to search the vehicle at the scene without a warrant. These cases, however, did not present the factual scenario that is present in respondent's case. Indeed, nor does any of this Court's precedents cited by Petitioner.

The Pennsylvania Supreme Court decision in this case thus does not conflict with this Court's precedents and has not in the least "abolished" the federal "automobile exception" to the warrant requirement, as the Commonwealth hyperbolically asserts. It does not "turn seventy years of constitutional automobile-search jurisprudence on its head." Petition, p. 6. On the contrary, by

declining automatically to except all automobiles searches from the warrant requirement, the Pennsylvania Supreme Court has done nothing more in this case than require that the automobile exception be considered and applied according to the facts of the case. Where the facts of a given case demonstrate that the "exigency" which has traditionally underpinned the automobile exception and is still recognized as one of its justifications -- the threatened loss of evidence due to the general mobility of vehicles -- is not implicated, the exception might not apply. And, with the case at bar, it has specifically held nothing more than that, in the distinct and limited situation where the evidence demonstrates a clear advance knowledge and opportunity to obtain a warrant to search a car before the police even come upon that car, the police should obtain that warrant. That holding poses no threat or impairment to law enforcement efforts, and no direct conflict with this Court's precedents.

In sum, the Commonwealth's petition, based upon an inaccurate statement of the case, and the consequentially inaccurate interpretation of the Pennsylvania Supreme Court's holding in this case, should be denied. The Commonwealth has not presented an argument to this Court to explain why this case, as limited by the facts found by the state courts, warrants this Court's attention.



II. THIS COURT LACKS JURISDICTION BECAUSE THE STATE COURT'S DECISION RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND.

This Court should deny the Petition for Writ of Certiorari because the Pennsylvania Supreme Court's judgment rests upon adequate and independent state grounds which undermine the jurisdiction of this Court. Michigan v. Long, 463 U.S. 104 (1983); Herb v. Pitcairn, 324 U.S. 117, 126 (1945). In Michigan v. Long, this Court held that it will not review a state court judgment when it is clear from the state court's opinion that the judgment rests upon adequate and independent state grounds. A clear, adequate and independent state ground exists in this case in the form of Article I, Section 8 of the Pennsylvania Constitution.

In Michigan v. Long, the state court had cited the Michigan Constitution in the course of its opinion, but this Court held that the passing references were not sufficient to establish an adequate and independent state ground. This Court noted that the state court had only twice cited its state constitution, but had cited no state cases to support the conclusion that the search was unconstitutional on the state ground. Moreover, the state court had relied exclusively upon an interpretation of Supreme Court and federal cases. Under these circumstances, it appeared to this Court that the Michigan court felt compelled to reach the result it did because of its interpretation of federal law.

That plainly is not the case here. Although reaching the same result under the federal and state constitutions, the Pennsylvania Supreme Court's decision in this case does not suggest in any way

that its consideration of the state constitution was secondary to, contingent upon, or compelled by its understanding of federal law. First, besides citing to the Pennsylvania constitutional provision at issue, the Pennsylvania Supreme Court sets forth that provision in its entirety, App. 8 n.4, refers to it through the opinion, and mentions both federal and state constitutional "standards." App. 13.

Furthermore, after only a brief discussion of the origin of the "automobile exception" in Carroll v. United States, 267 U.S. 132 (1925), and an even briefer discussion of Chambers v. Maroney, 399 U.S. 42 (1970), the Pennsylvania Supreme Court in this case proceeded to rely exclusively on state decisions. This is distinctly different from the situation in Michigan v. Long, in which, aside from two citations to the Michigan Constitution, the state's high court relied upon federal decisions. In sharp contrast, the Pennsylvania state decisions cited by the Pennsylvania Supreme Court in this case represent a body of law and tradition in this Commonwealth of inquiring into the necessity for a warrantless search of an automobile. Repeatedly, those cases have taught that vehicles are not "per se" excepted from the warrant requirement and will not be applied automatically without an examination of the circumstances of the case. The decisions cited in this case rested not only on the Fourth Amendment, but on Article I, Section 8 as well. E.g. Commonwealth v. Baker, 518 pa. 145, 541 A.2d 1381 (1988); Commonwealth v. Ionata, 518 Pa. 472,



544 A.2d 917 (1988); Commonwealth v. Holzer, 480 Pa. 93, 389 A.2d 101 (1978).

In the end, the Pennsylvania Supreme Court's decision below recognizes that what has emerged through the years of the Pennsylvania Supreme Court's consistent approach toward the search of vehicles is a jurisprudence of Pennsylvania:

> Therefore, we conclude that this Commonwealth's jurisprudence of the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search. Furthermore, we have consistently recognized that when police have advance information that a particular vehicle carrying evidence of a crime would be situated at a particular locale, such that sufficient time exists to obtain a warrant, the failure of the police to secure a warrant prior to searching the vehicle will render the search unreasonable.

App. 20 (emphasis added).

Moreover, even in dissent, Justice Castille notes that "the majority correctly characterizes Pennsylvania law requiring the 'automobile exception.'" App. 26 (Castille, J., dissenting).

Additionally, any suggestion that the Pennsylvania Supreme Court felt bound by federal constitutional law to render a decision it would not otherwise have rendered is belied by a host of recent Pennsylvania decisional law explicating Article I, Section 8: its distinct analytical differences from the Fourth Amendment, and the broader protections provided to citizens by it. Demonstrating its commitment to independent examination of Article I, Section 8, the Pennsylvania Supreme Court has asked and encouraged litigants raising state constitutional claims on appeal to provide a

separate, four-pronged and detailed state constitutional argument. Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991); Commonwealth v. White, __ Pa. __, 669 A.2d 896 (1996). Indeed, in Edmunds, the Pennsylvania high court wrote:

> Here in Pennsylvania, we have stated with increasing frequency that it is both important and necessary that we undertake an independent analysis of the Pennsylvania Constitution, each time a provision of that fundamental document is implicated. Although we may accord weight to federal decisions where they "are found to be logically persuasive and well reasoned, paying due regard to precedent and the policies underlying specific constitutional guarantees," Commonwealth v. Tarbert, 517 Pa. 277, 283, 535 A.2d 1035, 1038 (1987), quoting Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489, 502 (1977), we are free to reject the conclusions of the United States Supreme Court so long as we remain faithful to the minimum guarantees established by the United States Constitution.

526 Pa. at 389-90, 586 A.2d at 894-95.

More importantly, numerous Pennsylvania Supreme Court decisions of recent years have recognized that Article I, Section 8 provides greater protection against searches and seizures than does the Fourth Amendment, including Commonwealth v. White, __ Pa. __, 669 A.2d 896 (1996), a car search case decided the same day as the case at bar, which rejected New York v. Belton, 453 U.S. 454 (1981), under Article I, Section 8. See also Commonwealth v. Matos, 672 A.2d 769 (1996) (rejecting California v. Hodari. D., 499 U.S. 621 (1991), under Article I, Section 8); Commonwealth v. Mason, 535 Pa. 560, 637 A.2d 251 (1993) (refusing to apply under Article I, Section 8, the "inevitable discovery doctrine" as



applied in Segura v. United States, 468 U.S. 796 (1984); Commonwealth v. Martin, 534 Pa. 136, 626 A.2d 556 (1993) (dog sniff, deemed not to be a search under federal law, held to be a search requiring probable cause under Article I, Section 8); Commonwealth v. Edmunds, 526 Pa. 374, 586 A.2d 887 (1991) (rejecting United States v. Leon, 468 U.S. 897 (1984), refusing to find a "good faith exception" to the exclusionary rule in Pennsylvania, and determining that Pennsylvania's exclusionary rule is constitutionally mandated, not supervisory); Commonwealth v. DeJohn, 486 Pa. 32, 403 A.2d 1283 (1979) (declining to follow United States v. Miller, 425 U.S. 435 (1976), under Article I, Section 8).

As described and interpreted by the Pennsylvania Supreme Court, Article I, Section 8 gives stronger recognition to the privacy interests of Pennsylvania's citizens; those privacy interests weigh more heavily in the balance against the needs of law enforcement than is the case under the Fourth Amendment. In Commonwealth v. Mason, 435 Pa. at 571 n.3, 637 A.2d at 251 n.3, Justice Flaherty wrote for the Pennsylvania Supreme Court:

> Upon reflection, it is apparent that in the context of the Fourth Amendment, when a court deters police misconduct, it necessarily also safeguards privacy and the probable cause requirement. Why would a court deter police misconduct at all if not to deter police from improperly invading the right of persons to be secure, i.e., private, in their persons, houses, papers, and effects? Deterring police misconduct is not an end in itself. The ultimate distinction, then, between the federal and the Pennsylvania analysis is not that the federal courts seek only to deter police misconduct and the Pennsylvania courts

> seek to protect certain rights, but that the federal courts place less importance than do we on the right of privacy. Therefor, they balance the interests differently and reach a different conclusion as to the relative importance of privacy as against securing criminal convictions. (emphasis added.)

In Commonwealth v. White, __ Pa. __, 669 A.2d 896, 902, a car search case decided the same day as the case at bar, and relied upon in the case at bar, Justice Flaherty again wrote for the Pennsylvania Supreme Court majority:

> As we stated in Commonwealth v. Mason, 535 Pa. 560, n.3., 637 A.2d 251 n.3 (1993), this Court, when considering the relative importance of privacy as against securing criminal convictions, has struck a different balance than has the United States Supreme Court, and under the Pennsylvania balance, an individual's privacy interests are given greater deference than under federal law.

In his concurring opinion in White, Justice Montemuro, who authored the opinion in the case at bar, believed that the majority should have done a more exhaustive state analysis than it had before departing from federal precedent. Still, Justice Montemuro agreed with the result. He provided a telling state constitutional analysis of car searches and privacy interests that demonstrates the adequacy and independence of the state constitutional ground in the case at bar as well as in White. Justice Montemuro wrote:

> In the instant case, Appellant is asserting a privacy interest in his automobile. Of course, our cases have long recognized a diminished privacy interest in an automobile based on federal case law. [Citations omitted.] However, that federal privacy interest was substantially curtailed by the United States Supreme Court in Belton. My research indicates that we have also recognized a constitutionally protected



reasonable expectation of privacy in an automobile under Article I, Section 8 of the Pennsylvania Constitution. See Commonwealth v. Holzer, 480 Pa. 93, 101 & n.4, 389 A.2d 101, 105-06 & n.4 (1978); Commonwealth v. Baker, 518 Pa. 145, 148, 541 A.2d 1381, 1383 (1988), overruled on other grounds by Commonwealth v. Rosario, 538 Pa. 400, 648 A.2d 1172 (1994); Commonwealth v. Morris, 537 Pa. 417, 422 & n.3, 644 A.2d 721, 724 & n.3 (1994), cert. denied, 115 S. Ct. 610 (1994). In Holzer, we held that "constitutional protections are applicable to a person's car" under Article I, Section 8 of the Pennsylvania Constitution. Holzer, 480 Pa. at 103, 389 A.2d at 106. In Baker, we held that "[i]t is well established that automobiles are not per se unprotected by the warrant requirement of . . . Article I, Section 8 of the Pennsylvania Constitution." Baker, 518 Pa. at 148, 541 A.2d at 1383.

Thus, the history of Article I, Section 8 and case-law interpreting it reveal a history of according a limited expectation of privacy in an automobile independently under the Pennsylvania Constitution. Therefore, the question before us today is not whether we wish to extend additional privacy protections to the appellant but whether we wish to follow the United States Supreme Court and sharply curtail a privacy interest long recognized by this Court. In my opinion, this prong weighs against automatically adopting Belton. Instead, I believe we must carefully consider the merits of severely diminishing a privacy right independently recognized under our constitution.

Commonwealth v. White, __ Pa. at __, 669 A.2d at 905.

Further, in finally concluding that Belton should be rejected, Justice Montemuro wrote:

> I agree that the Belton rule is seriously flawed and has no place in Pennsylvania jurisprudence. It has long been the rule in this Commonwealth that the police may search the passenger compartment of a car incident to an arrest only to protect their safety or to prevent occupants from destroying contraband.

> Timko, 491 Pa. at 37, 417 A.2d at 622. In contrast, the Belton rule allows the police to search the passenger compartment and any containers contained therein even where no such exigency exists. . . . In my opinion, Belton carves too wide an exception to the warrant requirement where none is justified.

Id. at __, 669 A.2d at 908.

From all of the above, it is clear that Pennsylvania's references to the state constitution in the case at bar reflect an adequate and independent state ground for the Pennsylvania Supreme Court's decision. As interpreted and applied by Pennsylvania's high court, Article I, Section 8 is both separate and independent from federal law. In the context of search and seizure claims generally, and in the context of automobile searches in particular, the state's reliance upon Article I, Section 8 reflects a distinct basis for relief that is different from its federal counterpart. It would thus be unfair and inaccurate to conclude that the Pennsylvania Supreme Court "decided the case the way it did because it believed that federal law required it do so." Michigan v. Long, 463 U.S. at 1041. Rather, Pennsylvania's decisional law and Article I, Section 8 were recognized to provide an independent basis for concluding that Article I, Section 8 had been violated by the search in this case.

This Court stated in Herb v. Pitcairn, and reiterated in Michigan v. Long, that

> The jurisdictional concern is that we not "render an advisory opinion, and if the same judgment would be rendered by the state court after we corrected our views of federal laws, our review could amount to nothing more than an advisory opinion."



Michigan v. Long, 463 U.S. at 1042 (quoting Herb v. Pitcairn, 324 U.S. at 126). That is precisely the situation here. An adequate and independent state ground exists, and this Court should deny the Petition for Writ of Certiorari.

## CONCLUSION

For the foregoing reasons, petitioner's request for a writ of certiorari should be denied.

Respectfully submitted,

JOHN W. PACKEL, Assistant Defender
Chief, Appeals Division
Identification No. 13255
HELEN A. MARINO, Assistant Defender
ELLEN T. GREENLEE, Defender



## IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995 NO. 95-1691

COMMONWEALTH OF PENNSYLVANIA

V.

EDWIN LABRON,
Respondent

## CERTIFICATE OF SERVICE

I, John W. Packel, a member of the Bar of this Court, hereby certify that on this 20th day of May, 1996, copies of the Brief In Opposition To The Commonwealth of Pennsylvania's Petition For A Writ Of Certiorari and the Motion For Leave To Proceed In Forma Pauperis and Affidavit in Support Thereof in the above-entitled case were personally served upon

Ronald Eisenberg, Esquire (215) 686-5700
Deputy District Attorney of Philadelphia
1421 Arch Street
Philadelphia, Pennsylvania, 19102

counsel for the petitioner herein. I further certify that all parties required to be served have been served.

RECEIVED
MAY 22 1996
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SUPREME COURT, U.S.

JOHN W. PACKEL, Assistant Defender
Defender Association of Philadelphia
121 North Broad Street
Philadelphia, Pennsylvania 19107
(215) 568-3190

Date: May 20, 1996

**DEFENDER ASSOCIATION OF PHILADELPHIA**

121 North Broad Street
Philadelphia, PA 19107-1913
(215) 568-3190

Ellen T. Greenlee
**Defender**

May 20, 1996

William K. Suter, Clerk
United States Supreme Court
One First Street, N.E.
Room 30
Washington, DC 20543

Re: Pennsylvania v. Edwin Labron
U.S. Supreme Court No. 95-1691

Dear Mr. Suter:

Enclosed for filing please find an original and ten copies of Respondent Edwin Labron's Motion to Proceed in Forma Pauperis and Brief in Opposition to the Petition for Writ of Certiorari in the above-captioned matter.

I would appreciate your acknowledging receipt of these documents by stamping and returning to me the enclosed copy of this letter. I have enclosed for your convenience a stamped, self-addressed envelope.

Thank you for your attention.

Very truly yours,

Helen A. Marino

HELEN A. MARINO
Assistant Defender

cc w/encl: Ronald Eisenberg, Esquire
Deputy District Attorney

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NO. 95-1691

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1995

COMMONWEALTH OF PENNSYLVANIA,
Petitioner

v.

EDWIN LABRON,
Respondent

Petition for Writ of Certiorari to
the Supreme Court of Pennsylvania

# REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

RONALD EISENBERG
Deputy District Attorney
(Counsel of Record)
JOAN WEINER
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
ARNOLD GORDON
First Assistant District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
1421 Arch Street
Philadelphia, PA 19102
(215) 686-5700

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## STATEMENT OF THE CASE

The facts material to the question presented have been set forth in the Petition for Writ of Certiorari. Petitioner files this Reply Brief in response to respondent's Brief in Opposition.

## REPLY TO BRIEF IN OPPOSITION

In its petition for writ of certiorari, petitioner argued that this case warrants review because the Pennsylvania Supreme Court, here and in a series of other decisions, has fundamentally misconstrued the automobile exception to the warrant requirement of the Fourth Amendment. The state court believes that police, acting with probable cause, must show additional, particular exigent circumstances beyond the inherent mobility of the vehicle before they may search it. This notion erroneously confuses the automobile exception to the warrant requirement with the more general exigent circumstances exception.

Respondent does not attempt to contest that the state court so held. Instead, he tries to make the case appear unworthy of certiorari review by mislabeling the legal dispute here as a factual one, and by redressing the plainly federal ruling below in new state law clothes. Respondent's efforts to evade review should be rejected.

Respondent first contends that the Court should deny review because the certiorari petition "inaccurately" states the facts. Yet respondent fails to identify a single factual dispute between the parties, let alone any inaccuracies. Instead, the promised discussion of facts turns out to be a legal argument concerning the point at which probable cause arose.

Respondent contends that the police already had probable cause, based on various tips and previous surveillance, even before they saw respondent put drugs in the trunk of a car. Therefore, he maintains, petitioner is wrong in "suggesting" that probable cause to search the car arose only after the police corroborated their prior information with actual observation.[1]

But this legal dispute, far from supporting respondent's position here, instead proves the necessity for review. The whole point of the certiorari petition is that it does not matter when probable cause vests, because it does not matter whether the police had

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[1]Despite respondent's current position, it is understandable that the police would have been uncertain as to the exact point at which probable cause arose. So was respondent.

In his suppression motion, respondent asserted affirmatively that the search was conducted without probable cause -- that is, that the information available to the police never rose to the necessary level. In his memorandum of law in support of that motion, however, he argued that probable cause had existed all along, yet agreed that the police had no reliable or corroborated information about the car before they went to the scene to investigate.

Such uncertainty buttresses the need for the automobile exception. The police did not act unreasonably in choosing to conduct further surveillance -- during which they saw respondent sell drugs and store his inventory in the trunk -- rather than guessing wrong about whether they already had probable cause.



advance opportunity to secure a warrant -- or, put another way, whether specific "exigent circumstances" prevented them from doing so. Under the automobile exception, the existence of probable cause, in light of the reduced expectation of privacy in motor vehicles, is sufficient to support a search.[2]

By contrast, respondent's entire argument culminates in his assertion that the automobile exception does not apply if the police have "advance knowledge and opportunity to obtain a warrant to search a car." Brief in Opposition at 12. He insists that the state court so held, and that its holding was in complete accord with Fourth Amendment jurisprudence.

Thus respondent inadvertently but inescapably joins issue with petitioner. It is not possible to cover over the real conflict between the two positions. This Court should grant review to determine whether -- as in the state court's view of the Fourth Amendment -- the police must satisfy the exigent circumstances exception in order to satisfy the automobile exception, or whether -- in accordance with this Court's previous decisions -- the automobile exception remains distinct from the exigent circumstances exception.

Respondent next attempts to protect the lower court's erroneous federal ruling through a laborious effort to characterize the holding as an unreviewable

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[2]See, e.g. Cardwell v. Lewis, 417 U.S. 583, 595 (1974) (defendant argued that probable cause existed well before search of his automobile; held that, even assuming probable cause previously existed, the right to search was not foreclosed merely because a warrant was not obtained "at the first practicable moment").

determination of state law. If respondent were correct, however, he would not need any extended discussion of the issue; he would simply be able to point to a plain statement by the court that its decision was exclusively state law based.

Where, as here, a state court refers to federal law, and an "adequate and independent state ground" is not "plainly stated" in the court's opinion, there is a "conclusive presumption" that the state court decided the case the way it did because it believed federal law required it to do so. Arizona v. Evans, 115 S.Ct. 1185, 1186 (1995); Michigan v. Long, 463 U.S. 1032 (1983). The purpose of this conclusive presumption is to free this Court from the necessity of conducting exactly the sort of extended analysis in which respondent engages. It is not this Court's function to figure out whether the state court really meant something other than what it said.

Yet respondent does not claim a "plain statement"; in fact, he carefully avoids mention of any form of those words. Respondent's failure to identify the necessary statement (or even to acknowledge the requirement for one) is hardly accidental. There is no statement, plain or otherwise, placing the state court's holding on independent state grounds.

Respondent's argument is based instead on the assertion that the state court "reach[ed] the same result under the federal and state constitutions," and that the court did not explicitly label the state ruling as contingent on the federal. Brief in Opposition at 13-14. In other words, says respondent, if the state court does not make a plain statement that its decision is exclusively federal, then it must be presumed to be one



of state law. This argument simply reverses the conclusive presumption of Michigan v. Long.

Moreover, even if the Court accepted respondent's invitation to search the record for a clandestine independent state ground, there would be nothing to find. Respondent did not argue to the suppression court that state law entitled him to a broader protection regarding the "automobile exception." Nor did the suppression court make any such distinction in its ruling. In fact, the suppression court clearly stated that the resolution of the motion depended on a Fourth Amendment analysis, and it relied in its written opinion on two state court decisions -- Commonwealth v. Rodriguez, 526 Pa. 268, 585 A.2d 988 (1991), and Commonwealth v. Baker, 518 Pa. 145, 541 A.2d 1381 (1988) -- both of which were explicitly based on federal law. The intermediate appellate court did the same.

When the case reached the state supreme court, it mentioned the state constitution only to explain that the state provision was coterminous with the Fourth Amendment on the "automobile exception" question. The court then conducted a Fourth Amendment analysis. In doing so, the court referred to several Pennsylvania cases, but each and every one of them interpreted the "automobile exception" under this Court's decisions, not the state constitution (see Petition for Writ of Certiorari, at 11 n.6; 12 n.7).[3]

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[3]Rather than address these federal references, respondent spends the bulk of his argument (Brief in Opposition at 15-20) discussing Pennsylvania cases that were not even cited here. He claims that these cases

(continued...)

The last word on the nature of the ruling below comes from the Pennsylvania Supreme Court itself. In a companion case to this one, filed twelve days after the decision here, the court cited this case as controlling precedent for warrantless vehicle searches. Commonwealth v. Kilgore, 1995 WL 790060 at *3 (Pa. Dec. 26, 1995), petition for cert. filed, 64 U.S.L.W. 3741 (No. 95-1738). The court concluded that the search in question "was conducted in a manner which violated [the appellant's] rights under the Fourth Amendment"). Obviously, the court would not have relied on this case to support a Fourth Amendment ruling unless it considered this case to be a Fourth Amendment ruling. Respondent's Michigan v. Long argument is meritless.

This case, the cases decided with it, and the cases cited in those decisions, demonstrate that the Pennsylvania Supreme Court has a long and deeply

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[3](...continued)
show that the Pennsylvania Supreme Court often decides search and seizure issues on independent state grounds.

Indeed it does. But when it does, it says so. See, e.g., Commonwealth v. Edmunds, 526 Pa. 374, 411, 586 A.2d 887, 906 (1991) ("We base our decision strictly upon the Pennsylvania Constitution; any reference to the United States Constitution is merely for guidance and does not compel our decision. See Michigan v. Long [citation omitted]").

The Pennsylvania Supreme Court knows how to make a plain statement of an independent state ground. It did not make one here because it believed that its ruling was one of federal constitutional law.



entrenched view of the automobile exception to the Fourth Amendment warrant requirement. That view is at odds with this Court's precedent. It is time to correct the erroneous Pennsylvania interpretation of federal law on the automobile exception.

## CONCLUSION

For these reasons, as well as those stated in the petition for writ of certiorari, petitioner respectfully requests that a writ of certiorari issue to review the decision below.

Respectfully submitted,

RONALD EISENBERG
Deputy District Attorney
(Counsel of Record)
JOAN WEINER
Assistant District Attorney
CATHERINE MARSHALL
Chief, Appeals Unit
ARNOLD GORDON
First Assistant District Attorney
LYNNE ABRAHAM
District Attorney

Philadelphia District Attorney's Office
1421 Arch Street
Philadelphia, Pa. 19102
(215) 686-5700
June 1996

# SUPREME COURT OF THE UNITED STATES

95–1691 (5)

PENNSYLVANIA
*v.*
EDWIN LABRON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

95–1738 (H)

PENNSYLVANIA
*v.*
RANDY LEE KILGORE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

Nos. 95–1691 AND 95–1738. Decided July 1, 1996

PER CURIAM.

In these two cases, the Supreme Court of Pennsylvania held that the Fourth Amendment, as applied to the States through the Fourteenth, requires police to obtain a warrant before searching an automobile unless exigent circumstances are present. Because the holdings rest on an incorrect reading of the automobile exception to the Fourth Amendment's warrant requirement, we grant the petitions for certiorari and reverse.

In *Labron*, No. 95–1691, police observed respondent Labron and others engaging in a series of drug transactions on a street in Philadelphia. The police arrested the suspects, searched the trunk of a car from which the drugs had been produced, and found bags containing cocaine. The Pennsylvania Supreme Court agreed with the trial court (but not with the intermediate court of appeals, 428 Pa. Super. 616, 626 A. 2d 646 (1993), whose judgment it reversed) that this evidence should be suppressed. ___ Pa. ___, 669 A. 2d 917 (1995). After surveying our precedents on the automobile exception as

well as some of its own decisions, the court "conclude[d] that this Commonwealth's jurisprudence of the automobile exception has long required both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search." *Id.*, at ___, 669 A.2d, at 924. Satisfied the police had time to secure a warrant, *id.*, at 924–925, the court held that "the warrantless search of this stationary vehicle violated constitutional guarantees," *id.*, ___, 669 A.2d, at 924.

In *Kilgore*, No. 95–1738, an undercover informant agreed to buy drugs from respondent Randy Lee Kilgore's accomplice, Kelly Jo Kilgore. To obtain the drugs, Kelly Jo drove from the parking lot where the deal was made to a farmhouse where she met with Randy Kilgore and obtained the drugs. After the drugs were delivered and the Kilgores were arrested, police searched the farmhouse with the consent of its owner and also searched Randy Kilgore's pickup truck; they had seen the Kilgores walking to and from the truck, which was parked in the driveway of the farmhouse. The search turned up cocaine on the truck's floor. The trial court denied Randy Kilgore's motion to suppress the cocaine, holding the officers had probable cause to make the search. The appellate court affirmed. 437 Pa. Super. 491, 650 A. 2d 462 (1994). The Supreme Court of Pennsylvania reversed, citing *Labron* and holding that although there was probable cause to search the truck, ___ Pa. ___, ___, ___ A.2d ___, ___ (1995), the search violated the Fourth Amendment because no exigent circumstances justified the failure to obtain a warrant, ___, ___ A.2d, at ___.

The Supreme Court of Pennsylvania held the rule permitting warrantless searches of automobiles is limited to cases where "'unforeseen circumstances involving the search of an automobile [are] coupled with the presence of probable cause.'" (emphasis deleted) ___ Pa., at ___, 669 A. 2d, at 924, quoting *Commonwealth* v. *White*, ___ Pa. ___, ___, 669 A. 2d 896, 901 (1995). This was incorrect. Our first cases establishing the automobile



exception to the Fourth Amendment's warrant requirement were based on the automobile's "ready mobility," an exigency sufficient to excuse failure to obtain a search warrant once probable cause to conduct the search is clear. *California* v. *Carney*, 471 U. S. 386, 390–391 (1985) (tracing the history of the exception); *Carroll* v. *United States*, 267 U. S. 132 (1925). More recent cases provide a further justification: the individual's reduced expectation of privacy in an automobile, owing to its pervasive regulation. *Carney, supra*, at 391–392. If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment thus permits police to search the vehicle without more. *Carney, supra*, at 393. As the state courts found, there was probable cause in both of these cases: Police had seen respondent Labron put drugs in the trunk of the car they searched, and had seen respondent Kilgore act in ways that suggested he had drugs in his truck. We conclude the searches of the automobiles in these cases did not violate the Fourth Amendment.

Respondent Labron claims we have no jurisdiction to review the judgment in his case because the Pennsylvania Supreme Court's opinion rests on an adequate and independent state ground, viz., "this Commonwealth's jurisprudence of the automobile exception." ___ Pa., at ___, 669 A. 2d, at 924. We disagree. The language we have quoted is not a "plain statement" sufficient to tell us "the federal cases [were] being used only for the purpose of guidance, and d[id] not themselves compel the result that the court ha[d] reached." *Michigan* v. *Long*, 463 U. S. 1032, 1041 (1983). The Pennsylvania Supreme Court did discuss several of its own decisions; as it noted, however, some of those cases relied on an analysis of our cases on the automobile exception, see, *e. g.*, ___ Pa., at ___, 669 A. 2d, at 921 (observing *Commonwealth* v. *Holzer*, 480 Pa. 93, 103, 389 A. 2d 101, 106 (1978), cited *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971)); ___ Pa., at ___, 669 A. 2d, at 924

(stating *Commonwealth* v. *White*, *supra*, rested in part upon the Pennsylvania Supreme Court's analysis of *Chambers* v. *Maroney*, 399 U. S. 42 (1970)). The law of the Commonwealth thus appears to us "interwoven with the federal law, and . . . the adequacy and independence of any possible state law ground is not clear from the face of the opinion." *Michigan* v. *Long*, 463 U. S., at 1040–1041. Our jurisdiction in Labron's case is secure. *Ibid.* The opinion in respondent Kilgore's case, meanwhile, rests on an explicit conclusion that the officers' conduct violated the Fourth Amendment; we have jurisdiction to review this judgment as well.

Respondent Labron's motion to proceed *in forma pauperis* is granted. The petitions for writs of certiorari are granted, the judgments of the Supreme Court of Pennsylvania are reversed, and the cases are remanded for further proceedings not inconsistent with this opinion.

*It is so ordered.*

# SUPREME COURT OF THE UNITED STATES

95–1691

PENNSYLVANIA
*v.*
EDWIN LABRON

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, EASTERN DISTRICT

95–1738

PENNSYLVANIA
*v.*
RANDY LEE KILGORE

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF PENNSYLVANIA, MIDDLE DISTRICT

Nos. 95–1691 AND 95–1738. Decided July 1, 1996

JUSTICE STEVENS, with whom JUSTICE GINSBURG joins, dissenting.

The decisions that the Court summarily reverses today are two of a trilogy of cases decided by the Pennsylvania Supreme Court within three days of each other. See *Commonwealth* v. *Kilgore*, ___ Pa. ___, ___ A. 2d ___ (1995) (1995 WL 790060); *Commonwealth* v. *White*, 669 A. 2d 896 (1995); *Commonwealth* v. *Labron*, ___ Pa. ___, 669 A. 2d 917 (1995).[1] In each case, that court concluded that citizens of Pennsylvania are protected from warrantless searches and seizures of their automobiles absent exigent circumstances. But a fair reading of both *White* (the holding of which the Commonwealth has not challenged in this Court) and *Labron* (which the Court reverses today) demonstrates that their judgments almost certainly rested upon the Pennsylvania court's

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[1]Each decision was issued by a different division of the Pennsylvania Supreme Court.

independent consideration of its own Constitution. For that reason, I do not believe that we have jurisdiction over the decision in *Labron*, just as we would not have jurisdiction in *White*. See 28 U. S. C. §1257(a).[2] Furthermore, when considered in light of those two more carefully reasoned decisions, there is no reason for this Court to disturb the state court's finding in *Kilgore*, since the result will almost certainly be affirmed on remand.

In its *per curiam* decision, this Court concludes that because the decision in *Labron* cited state decisions which in turn referred to two 25-year-old cases of this Court, any reference to state law is "'interwoven with the federal law.'" *Ante*, at 4 (citing *Michigan* v. *Long*, 463 U. S. 1032, 1040 (1983)). These references, however, seem to me a rather short thread with which to weave—let alone upon which to hang—our jurisdiction.

In my opinion, the best reading of *Labron*'s plain language is that it relied on adequate and independent state grounds. The majority decision below includes references to four sources of federal law: The Federal Constitution and three federal cases. None of the references demonstrates that the decision rested upon anything other than state law.

The decision begins with the proposition, not at issue here, that "the Fourth Amendment to the United States Constitution and Article I, §8 of the Pennsylvania Constitution generally require that searches be predicated upon a warrant issued by a neutral and detached magistrate." ___ Pa. ___, ___, 669 A. 2d 917, 920 (1995) (citations omitted). It then reviews the history of the

[2]Even if, as the Court concludes, *ante*, at 3–4, some element of residual doubt suggests that Pennsylvania's Supreme Court drew inspiration from our interpretations of the Federal Constitution, I do not think that reliance sufficient to justify expending this Court's time—or that of the Pennsylvania Supreme Court—simply to scour the state decisions of all references to the Federal Constitution. See *infra*, at 6–11.



so-called "automobile exception" to the warrant requirement by quoting several passages from our decision in *Carroll* v. *United States*, 267 U. S. 132 (1925), which first established the exception, and then quotes a passage from *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970),[3] which appears to support the proposition under Federal law that the Court emphasizes here today (that the existence of probable cause is sufficient in and of itself to justify a search of a vehicle). ___ Pa., at ___-___, 669 A. 2d, at 920–921.

Rather than follow the developments of federal law, however, the decision then specifically and immediately notes that "[w]hen reviewing warrantless automobile searches *in this Commonwealth*, we have constantly held that 'there is no "automobile exception" as such and [that] the constitutional protections are applicable to searches and seizures of a person's car.' *Commonwealth* v. *Holzer*, 480 Pa. 93, 103, 389 A. 2d 101, 106 (1978) (citing *Coolidge* v. *New Hampshire*, 403 U. S. 443 (1971))." ___ Pa., at ___, 669 A. 2d, at 921 (emphasis added). From that point onward, the only reference to federal law in the decision's remaining 30 citations is a recognition that *White*, the sole decision of this trio of "exigent circumstance" cases that is not before our Court, was "based upon" that Court's analysis of *Chambers*. *Id.*, at ___, 669 A. 2d, at 923–924. Every other citation in *Labron* is to Pennsylvania law.

Because *White* was issued on the same day as *Labron* and reached an identical conclusion regarding the "exigent circumstances" rule, that decision is worth reviewing. In *White*, the court hesitated before consid-

[3]As the Pennsylvania Supreme Court noted, in *Chambers* we held that "'[f]or constitutional purposes, [there is] no difference between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate and on the other hand carrying out an immediate search without a warrant.'" ___ Pa. ___, ___, 669 A.2d 917, 921 (1995) (quoting *Chambers* v. *Maroney*, 399 U. S. 42, 52 (1970)).

ering the merits of the case "to address the Commonwealth's claim that White has waived his claim that the search of his automobile was illegal under Article I, Section 8 of the Pennsylvania Constitution because he did not set forth his state constitutional claims in the manner required." The Commonwealth's claim, the Court found, was "meritless." "White clearly raises a claim under the Pennsylvania Constitution, cites cases in support of his claim, and relates the cases to the claim. That is sufficient." ___ Pa., at ___, 669 A. 2d, at 899.

Having established the importance of the state constitutional claim to the defendant's argument, *White* went on to discuss the "exigent circumstance" exception at issue here in light of both federal and state law. And although the court's analysis relied upon our decision in *Chambers* v. *Maroney*, it cited none of the subsequent cases in which this Court has effectively converted the "automobile exception" into a absolute rule allowing searches in the presence of probable cause. See ___ Pa., at ___, 669 A. 2d, at 899–901; n. 6, *infra* (noting that the Pennsylvania courts' failure to refer to this Court's subsequent decisions in this area may be intentional rather than ignorant). Stressing the independent evaluation it makes of its State Constitution, the Pennsylvania court also rejected our decision in *New York* v. *Belton*, 453 U. S. 454 (1981) on state constitutional grounds. See ___ Pa., at ___, 669 A. 2d, at 902–903.[4]

Notably, the Commonwealth has not asked this Court to review the Pennsylvania court's decision in *White*,

[4]Although the court's main opinion in *Commonwealth* v. *White*, 669 A. 2d 896 (1995), also asked whether the search would have been permissible as a search incident to an arrest, the dissent later noted that the only question presented in the appeal was whether "exigent circumstances" were necessary to permit a warrantless search of a car based on probable cause. See *Id.*, at ___, 669 A. 2d, at 910.



even though the search in that case would be affirmed under the Commonwealth's and this Court's understanding of Pennsylvania's holding regarding exigent circumstances. I also note that lower state courts have explicitly read *White* as establishing a state constitutional right, not a federal right. *Commonwealth* v. *Haskins*, 1996 WL 183880, *2 (Pa. Super., Apr. 18, 1996) ("In order to search an automobile without a warrant, the police must still show the existence of both probable cause and exigent circumstances. *Commonwealth* v. *White*, ___ Pa. ___, 669 A. 2d 896 (1996). . . . In *White*, our Supreme Court reiterated that the Pennsylvania Constitution requires such a showing"); see also *Commonwealth* v. *Yedinak*, 1996 WL 179935, *5, n. 5 (Pa. Super., Apr. 11, 1996) ("The Pennsylvania Supreme Court recently held that the Pennsylvania Constitution provides greater protection than the United States Constitution with regard to automobile searches in *Commonwealth* v. *White*").

The lower courts' understanding regarding the state-law nature of *White*—and my understanding of the state-law nature of *Labron* as well—is almost perfectly reflected in the dissents to each case that were penned by Justice Castille. In both instances, Justice Castille recognizes, even more explicitly than the majority, that the decisions were based on state law.

In *Labron*, for instance, his main point was that the defendant had no standing to challenge the constitutionality of the search of a car that he did not own. In making his argument, however, he noted that "the majority correctly characterizes *Pennsylvania law* regarding the 'automobile exception' to the warrant requirement." ___ Pa., at ___, 669 A. 2d, at 926 (emphasis added). And although he reviewed decisions of this Court on standing to claim violations of the Fourth Amendment, he went on to note: "*Under Article I, Section 8 of the Pennsylvania Constitution*, however, this Court looks to several additional factors to determine whether a criminal defendant has standing to challenge

the admission of evidence against him." *Id.*, at ___, 669 A. 2d, at 927.

In *White*, Justice Castille stated that he believed that "the automobile exception to the warrant requirements of *this Commonwealth* should be a *per se* rule regardless of how much time police may have to obtain a warrant," *id.*, at ___, 669 A. 2d, at 909 (emphasis added), and he further concluded that he would "urge the adoption of a bright line rule that would allow warrantless searches of all automobiles for which police have independent probable cause," *id.*, at ___, 669 A. 2d, at 909–910. Of course, if Justice Castille were interpreting federal, rather than state, law, he would not have the luxury of "urging the adoption" of a particular rule.[5]

Having reviewed the range of the Pennsylvania courts' statements regarding the source of the "exigent circumstances" rule, it is worthwhile to review this Court's understanding of when a state decision is based on adequate and independent state grounds. In *Michigan* v. *Long*, the Court adopted a "plain statement" rule for determining whether a state decision rested on "independent and adequate" state-law grounds. "Because of [our] respect for state courts, and [a] desire to avoid advisory opinions, . . . we [did] not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions." 463 U. S., at 1040. When "a state court decision fairly appears to rest *primarily* on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion," we held, we would

[5]Justice Castille also specifically noted that the *Belton* decision was not raised by the parties, and that the majority's discussion of it was dicta, further emphasizing that his emphasis on Pennsylvania law was related to the sole issue that he believed presented: Whether a warrantless search of an automobile requires both probable cause and an exigent circumstance.



conclude that the State decided as it did because federal law required it to do so. *Id.*, at 1040–1041.

Given the explicit and nearly exclusive references to state law that I review above, it seems to me that the Court's decision to take jurisdiction in *Labron* not only extends *Michigan* v. *Long* beyond its original scope, but it stands its rationale on its head. *Labron* does not rest "primarily" on federal law; as Justice Castille understood it, as the briefing in *White* understood it, and as the Commonwealth's decision to stay out of *White* demonstrates, every indication is that the rule adopted in *Labron* and *White* rests primarily on state law. Nor are these holdings "interwoven" with federal law: Both *Labron* and *White* cite only two federal cases, both over a quarter-century old; rather than implicitly conclude that the absence of any reference to more recent decisions is due to poor legal research, I would trust the Pennsylvania courts' ability to understand and choose to deviate from our federal law. Certainly it would be a more respectful approach, in a case where the question is as close as it is in this case, to conclude that the State had made a conscious decision to depart from the jurisprudence of this Court rather than an error of law.[6]

[6]Indeed, the author of *Labron* noted in *White* that "the history of Article I, Section 8 and case-law interpreting it reveal a history of according a limited expectation of privacy in an automobile independently under the Pennsylvania Constitution. Therefore, the question before us today is not whether we wish to extend additional privacy protections to the Appellant but whether we wish to follow the United States Supreme Court and sharply curtail a privacy interest long recognized by this Court." *Commonwealth* v. *White*, ___ Pa., at ___, 669 A. 2d, at 905.

To this end, I find it particularly interesting that only two Pennsylvania courts have cited the decision in *California* v. *Carney*, 471 U. S. 386 (1985), upon which the *per curiam* decision relies as modern support for its interpretation of federal constitutional law. See *Commonwealth* v. *Rosenfelt*, 443 Pa. Super. 616, 632–634, 662 A. 2d 1131, 1139 (1995); *Commonwealth* v. *Camacho*, 425 Pa. Super. 567, 625 A. 2d 1242 (1995). Each of those decisions expressly noted

The nature of the Pennsylvania Court's reliance on federal law in these cases, therefore, is quite different from that which spurred the Court to conclude in *Michigan* v. *Long* that the judgment of the Michigan Supreme Court had not relied on adequate and independent state grounds. There, as the Court noted, the decision below "referred twice to the State Constitution in its opinion, but otherwise relied *exclusively* on federal law." *Id.*, at 1037 (emphasis added). The dissents below also relied explicitly and *exclusively* on decisions of this Court. *Id.*, at 1037, n. 2; *Michigan* v. *Long*, 413 Mich. 461, 473–486, 320 N. W. 2d 866, 870–875 (1982) (Coleman, C. J., dissenting, Moody, J., concurring in part and dissenting in part). Indeed, the critical holding of the Court was that the Michigan "Court of Appeals erroneously applied the principles of *Terry* v. *Ohio*." *Id.*, at

the presence of conflict between federal and state law on this issue.

In *Camacho*, the Superior Court noted "the discrepancy between some of the Commonwealth's past cases and federal cases which speak to automobile searches" in cases like those at issue here. *Id.*, at 576, n. 2, 625 A. 2d, at 1247, n. 2. After reviewing the holding in *Carney*, the Court noted that the state cases concluding that there was no *per se* "'automobile exception'" were "simply dated and not in keeping with the tenor of current law." *Id.*, at 577, n. 2, 625 A.2d, at 1247, n. 2.

The Court in *Rosenfelt* reached an alternative explanation for the conflict—and a result identical to that reached in the cases reversed by the Court today. There, the defendant agreed that the search of the vehicle was not illegal under federal law. Citing *Carney*, the Court noted that the federal "automobile exception" had "jettison[ed]" the requirement of exigency, essentially converting the exception into a *per se* rule allowing a search once probable cause exists. See 443 Pa. Super., at 633, 644–645, 662 A. 2d, at 1139, 1145. Noting that the State Constitution could extend greater protections to Pennsylvania citizens than did the Federal Constitution, but that its Supreme Court had not yet decided whether that was the case, the Superior Court went on to review the issue on its own and found a state constitutional violation. *Ibid.* After it decided the cases at issue here, the Pennsylvania Supreme Court denied the Commonwealth's appeal. See 674 A. 2d 1070 (1996) (table).



471, 320 N. W. 2d, at 869 (citation omitted).[7] The opinion in this case presents almost precisely the opposite situation: The decision refers to the Federal Constitution once, but otherwise relies *exclusively* on state law.

For these reasons, just as the decision in *White* would not merit summary reversal were it before this Court, the decision in *Labron* should not be summarily reversed. Although *Labron* and *White* both touch upon, and even place some historical reliance upon, federal search and seizure law, each also recognizes the broad interpretation that the Pennsylvania court has given its own constitutional prohibition against warrantless searches. I therefore seriously question whether respect for the reasoning, independence, and resources of the Pennsylvania court will be advanced by today's decision.

While *Kilgore* relies more explicitly on the Federal Constitution than the other two decisions, it decided the identical issue that was decided in *Labron* and *White*

[7] On the many subsequent occasions in which this Court has taken jurisdiction over state decisions over which there was some dispute about the nature of the relationship between federal and state law, the state opinions were far more "interwoven" with federal law than is true in this case. See, *e.g.*, *Illinois* v. *Rodriguez*, 497 U. S. 177, 182 (1990) (decision below did not "rely on (or even mention) any specific provision" of State Constitution); *Pennsylvania* v. *Muniz*, 496 U. S. 582, 588, n. 4 (1990) (state constitutional provision construed to provide protections identical to Federal Constitution); *Florida* v. *Riley*, 488 U. S. 445, 448, n. 1 (1989) (decision below mentioned State Constitution only twice, but "focused exclusively on federal cases dealing with the Fourth Amendment"); *Michigan* v. *Chesternut*, 486 U. S. 567, 571, n. 3 (1988) (decision below "said nothing to suggest that the Michigan Constitution's seizure provision provided an independent source of relief, and the court's entire analysis rested expressly on the Fourth Amendment and federal cases"); *Kentucky* v. *Stincer*, 482 U. S. 730, 735, n. 7 (1987) (decision below "consistently referred to respondent's rights under the . . . Federal Constitution as supporting its ruling"); *Maryland* v. *Garrison*, 480 U. S. 79, 83–84 (1987) (State Constitution construed *in pari materia* with Federal Constitution).

only three days before those decisions issued. The reference to the Federal Constitution upon which the Court rests its jurisdiction—only one of two references to federal law—must be read in the context of the other two decisions, each of which relied heavily upon the Commonwealth's own Constitution. In light of *Labron* and *White*, the judgment in *Kilgore* will almost certainly remain the same on remand. In such a circumstance, the rationales supporting the rule of *Michigan* v. *Long* simply do not support the decision to reverse. The petition in *Kilgore* should simply be denied.

On many prior occasions, I have noted the unfortunate effects of the rule of *Michigan* v. *Long*. See, *e.g.*, *Harris* v. *Reed*, 489 U. S. 255, 266–267 (1989) (STEVENS, J., concurring); *Delaware* v. *Van Arsdall*, 475 U. S. 673, 689–708 (1986) (STEVENS, J., dissenting); *Montana* v. *Hall*, 481 U. S. 400, 411 (1987) (STEVENS, J., dissenting); *Ponte* v. *Real*, 471 U. S. 491, 501–503 (1985) (STEVENS, J., concurring in part); see also *Arizona* v. *Evans*, 514 U. S. ___, ___-___ (1995) (GINSBURG, J., dissenting). Because the state-law ground supporting these judgments is so much clearer than has been true on most prior occasions, see n. 5, *supra*, these decisions exacerbate those effects to a nearly intolerable degree. Particularly in light of my understanding of this Court's primary role—"to protect the rights of the individual that are embodied in the Federal Constitution," *Harris*, 489 U. S., at 267—the decision to summarily reverse state decisions resting tenuously at best on federal grounds is imprudent and entirely inconsistent "with the sound administration of this Court's discretionary docket." *Ponte*, 471 U. S., at 502–503.

The Pennsylvania Court has in this and other cases expressly indicated its intent to extend the protections of its constitution beyond those available under the Federal Constitution, see, *e.g.*, *Commonwealth* v. *Edmunds*, 526 Pa. 374, 586 A. 2d 887 (1991) (setting forth test for establishing rights under Pennsylvania Constitution); *Commonwealth* v. *Rosenfelt*, 443 Pa. Super. 616, 634–637, 662 A. 2d 1131, 1140–1141 (1995) (reviewing state cases extending greater protections under the Pennsylvania Constitution). The *per curiam* decision that the Court issues today merely makes that task harder by requiring the Commonwealth to purge its decisions of any reliance on the latter, despite the value of the insights that our decisions can provide on related issues of law. By "unceremoniously reversing its judgment," *Van Arsdall*, 475 U. S., at 701 (STEVENS, J., dissenting), we also demonstrate a lack of respect for the Pennsylvania court and the sophistication of its state search and seizure law. See *id.*, at 699.



These harms are particularly unnecessary given the likely result on remand. To reinvigorate the privacy protections extended to Pennsylvania citizens under *Labron*, *Kilgore*, and *White*, the Pennsylvania Supreme Court need only set forth the appropriate talismanic language and state, even more clearly than it already has, that the "*Commonwealth's* jurisprudence of the automobile exception [requires] both the existence of probable cause and the presence of exigent circumstances to justify a warrantless search." *Labron*, ___ Pa., at ___, 669 A.2d, at 924 (emphasis added).[8] While the result will be identical, resources and respect will have been unnecessarily lost.

I respectfully dissent.

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[8]State courts have, of course, done this on many occasions in the past. See, *e.g.*, *Ponte* v. *Real*, 471 U. S. 491, 503, n. 4 (1985) (STEVENS, J., concurring in part) (listing various cases in which reversals by this Court were followed by state court decisions affirming the original holding on state-law grounds); *Montana* v. *Hall*, 481 U. S. 400, 411 (1987) (STEVENS, J., dissenting) (same).